

RENDERED: JULY 12, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001121-MR

TAMMY GREER

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 10-CI-00575

DORA HICKS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, MAZE, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: The Appellant, Tammy Greer, appeals the June 20, 2011, order of the Floyd Circuit Court, in response to her motion to alter, amend, or vacate its original order of April 20, 2011. The court sustained Greer's motion to the extent that it amended the prior judgment to allow Greer 60 days from May 13, 2011, to construct an alternate entrance to her property, but otherwise overruled the

motion in its entirety finding that Greer had failed to demonstrate adverse use of the property owned by Appellee, Dora Hicks. On appeal, Greer argues that the court erred in denying her claim of adverse possession and for a prescriptive easement for ingress and egress to her property, and that the judgment was not supported by the evidence in the record. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

This matter initially arose when Greer filed a petition to quiet title to the property at issue on May 28, 2010, and proceeded to trial on February 24, 2011. Tammy's husband, Jerry Greer, testified that he and Tammy have lived on the property that they own for 19 years. Greer testified that they have continually resided on the property since 1992, aside from a period of time during which they rented the property. Greer stated that the disputed property, an area which is the ditch line adjacent to the existing road, has been used by the Greers since they moved in. Upon moving to the property in 1992, Mr. Greer put gravel and fill in the area. Greer testified that in the past, he had vehicles sitting on the disputed area for over a year. He testified that while there may have been a few days during which trailers were being switched on the property, he was still on the property during those times, hooking things up.

Evidence from a survey conducted by Eddie Childers was also introduced below. That survey indicated that Tammy's home was just over two feet from the property line. On the survey map, the area in dispute is labeled "graveled parking area." It is approximately thirty feet wide. The survey identifies the only public

road as being Sally Stephens Branch Road which passes by the front of the parties' property. Additionally, it shows a private paved drive that services the homes of the Skeans family. There was no evidence introduced at trial that the paved drive was a public road.

Betty Shell also testified below on behalf of the Greers. She stated that she rented the property and moved in around the end of October 2001 as soon as the Greers moved out, and that she left in July of 2002. During her stay on the property, she used the entire disputed area as a driveway and yard, up to the existing road. Shell stated that at no time did anyone say anything to her about her use of the road and driveway or yard.

Dora Hicks also testified below. Hicks acknowledged that Shell moved into the property following the Greers' decision to move to another residence to take care of Greer's sick mother. She acknowledged that the Greers have used the road and cut the grass in the area at issue since moving in, in the early 1990s. She also acknowledged that the Greers have graveled the area since the early 1990s. Hicks stated that her brothers asked the Greers not to cross the road, and to make their own access.

Tammy Greer also testified in this matter. Greer stated that since moving into the property in 1992, she moved out only during the occasion that Shell lived there. Greer stated that upon leaving her mother's home in 2002, the Greers moved directly back into the property. She also stated that during the time the Greers have lived on the property, there were three trailers on the property, and

that she moved things from one trailer to another while they were on the property.

Greer stated that no one gave her permission to use the yard-driveway area.

Thomas Skeans, brother of Dora Hicks, testified on Hicks's behalf below, stating that he used to own the property now owned by the Greers. Thomas stated that he sold the property to his brother, Hank Skeans, who subsequently sold it to the Greers. Skeans testified that he was at the property several times in 1996, and did not observe any trailer there, although there was "junk" on the property where the trailer used to be. Joe Skeans, another brother of Dora's, testified that the Greers occupied and resided on the property except when they were moving trailers, and that the property may have gone a week or two without a trailer on it while that was occurring.

Jay Hicks, Dora's husband, also testified on Dora's behalf. Jay stated that Mr. Greer's sister lived in the property when he moved into his wife's home. Jay stated that while he believed over a year had passed before they moved back to the property he conceded that he did not pay much attention as to the exact amount of time before they moved back in.

Upon the close of testimony, the judge stated that he and counsel would view the property. After doing so, and receiving post-trial memoranda from both parties, the court issued a judgment on April 20, 2011, in favor of Hicks, finding that Greer had failed to meet her burden of proving adverse possession for a fifteen-year period, and finding that the testimony of Jerry Greer established that the property was vacant for up to a year, and that until recently the use of the

property was permissive in nature. This latter finding is dispositive of the outcome of the case; see discussion *infra*.

Greer then filed a motion to alter, amend, or vacate the judgment, asserting that Jerry Greer had not provided testimony which would support the court's finding that the property had been vacant for over a year during the requisite period of time to establish adverse possession. Moreover, Tammy argued that while the court found that "undisputed testimony" established a lack of occupancy during the two periods when the trailers were being moved, Tammy and Jerry had both testified that they actually continued to use the property during those periods. Further, Tammy asserted that though the court found evidence of permissive use, no such testimony was given in the record of this matter. Finally, as to the period necessary to prove adverse possession, Tammy argues that Kentucky Revised Statutes (KRS) 413.060 would only require proof of seven years' possession.

As previously noted herein, the court entered an order on June 21, 2011, overruling the motion to alter, amend, or vacate aside from granting Tammy 60 days to construct an alternate entrance to her property, and finding that the use of the property was permissive, and that Tammy failed to prove her burden of establishing adverse possession. It is from that order that Tammy now appeals to this Court.

On appeal, Tammy makes five arguments, namely: (1) There is no basis upon which to affirm the judgment of the trial court as the trial court's

judgment is based on nonexistent testimony;¹ (2) Tammy met her burden of showing adverse possession of the property for the statutory period of fifteen years per KRS 413.010; (3) The finding of permissive use by the trial court is unsupported by the evidence; (4) The trial court incorrectly viewed this case as a prescriptive easement case rather than an adverse possession case;² and (5) The trial court adjudicated the access to Greer's property without joining all necessary parties. In response, Dora argues that the trial court's determination concerning Tammy's failure to establish the elements of adverse possession was supported by substantial evidence. Dora asserts that the evidence clearly established that Tammy's use of the property at issue was permissive and that, accordingly, the court was correct in finding that she failed to meet her burden of establishing adverse possession. Thus, Dora argues that the issue of whether Tammy established any of the remaining elements of adverse possession is moot.

Concerning the issue of whether the court incorrectly viewed this case a prescriptive easement case rather than as an adverse possession case, Dora asserts that while the court did consider the question of prescriptive easement, it did so only in the limited context of determining whether the Greers would be entitled to

¹ Specifically, Greer asserts that the court, in its judgment, stated that "actual testimony from Jerry Greer established that a significant period of up to a year passed when no one occupied the property." Greer argues that she has reviewed the testimony in the record and can find none supporting the court's finding in this regard. However, our review of the record indicates that in fact, Jerry Greer testified on the record that he and his wife had moved to Prestonsburg, and were off the property for approximately one year. (Video 02/24/2011, Testimony of Jerry Greer, 9:17:30). Accordingly, we decline to address this issue further herein.

² Tammy asserts that while it is true that she uses the disputed property to gain access to her property, more than ingress and egress was at issue, as her family used the area to park vehicles, store old vehicles, and as a yard area for their home.

a prescriptive easement across the area they were using in order to have access to their property. However, Dora argues that this issue is ultimately irrelevant, as the evidence established that the Greers had access to a public road in order to reach their property.

Finally, concerning the issue of whether the court failed to add necessary parties, Dora asserts that this issue was unpreserved and, accordingly, should not be reviewed. Moreover, Dora argues that this is actually not an issue appropriately disputed, as the evidence establishes that the private paved drive on the survey is not a public road, but is actually a road used by the Skeans family. Thus Dora argues that because there is no evidence that Floyd County had taken the road into its road system, there was no need to join Floyd County as a party.

Prior to addressing the arguments of the parties, we note that pursuant to Kentucky Rules of Civil Procedure (CR) 52.01, findings of fact 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. Findings of fact are clearly erroneous if they are not supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence is that which a reasonable person would accept as sufficient to support a conclusion, whether taken alone, or in light of all the other evidence. *Id.* Further, regardless of conflicting evidence, or the fact that this Court may 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 that is a task within the exclusive province of the trial court. *Id.* Thus, in

addressing the issues raised on appeal by Greer, it is the function of this court to review the trial court's determination that Greer failed to meet her burden of establishing adverse possession, and to determine whether that finding was supported by substantial evidence. In addressing that issue, we note the record below indicates that Greer testified as follows below:

Q: Right. Well, has anybody ever come up to you, except for the last year or two, Ms. Hick's or Mr. Hick's, has anybody ever come up to you and said, 'don't use it'?

A: No, sir. Her brother, the one that died, he was working next door, putting baskets up and he told us, he went over there and ask 'em if they had a pipe to put across the ditch line so we could travel across through there. And he blacktopped above **our** driveway going up to his property – the brick house.

[Video, 02/24/2011, Tammy Greer 9:34:08-9:39:37]

Q: Uh, the only way in and out ... now you're, uh, the whole front of your property in on Sally Steven's Branch? Is that ... runs up to Sally Steven's Branch, correct? The front of your property?

A: Yeah, it goes up to main highway.

Q: Right. Um, so ...

A: ... It's a ditch ...

Q: You can get on, you can get on and off the prop –

A: No. Sir, no – It's a creek. It's all a creek up through there.

Opposing counsel: Judge, if I may, at this time, I'd object 'cause I don't think that really is relevant to what we're about – it seems like he's asking her about access to that driveway and that's not an issue in this case.

Court: Well, I think it may be. Overruled.

A: It's a creek, sir, you'd have to put culverts in.

[Video, 02/24/2011, Tammy Greer, 9:36:45-9:37:30]

Q: Ok. Alright, um, now you said her brother put a pipe in undern - -

A: -- her brother went next door to ask 'em if they had a pipe to put in the ditch line so we could cross it, 'cause it was just a ditch line, instead of tearing the cars up, you know, he went over there, Ike did, and asked 'em if they

had a pipe that they could give us cause it was, uh, the wire basket people, they was fixing their hill. And they did bring a pipe over there and put it in for 'em ... or us.

Q: Ok. And is this the pipe that's under the part that you're calling the driveway?

A: (sighs)

Q: I don't know, ma'am, I'm trying to understand.

A: It's the ditch line that comes off the road that goes off the hill.

Q: Ok.

A: It's the ditch line.

Q: So it's above where your driveway is?

A: No. That's what we cross to get in the driveway.

[Video, 02/24/11, Tammy Greer, 9:37:45-9:38:39]

Q: So, so her brother, Ike, said it was alright for you to cross that driveway?

A: Well, he didn't say not to, but he went and got a pipe.

[Video, 02/24/2011, Tammy Greer, 9:39:02-9:39:18]

Q: He just put a pipe in for you?

A: He got, he didn't do it, he went over there and asked 'em, 'cause he was a jolly man, you know, he would go talk to people. And he was over there talking to 'em and he asked 'em and they brought it over there and put it in for us.

[Video, 2/24/2011, Tammy Greer, 9:39:30-9:39:45]

The law of the Commonwealth concerning adverse possession is clear. It is the burden of the claimant to establish and prove each element of a claim for adverse possession by clear and convincing evidence. *Commonwealth Department of Parks v. Stephens*, 407 S.W.2d 711, 713 (Ky. 1966)(disagreed with on other grounds by *Meade v. Sturgill*, 467 S.W.2d 363 (Ky. App. 1971). Thus, it was Greer's burden to establish possession of the disputed property under a claim of right hostile to the owner's interest. *Phillips v. Akers*, 103 S.W.3d 705 (Ky. App. 2002). As this Court previously stated in *Henninger v. Brewster*, 357 S.W.3d 920 (Ky. App. 2012):

As explained by one authority, “[h]ostility is the very marrow of **adverse possession**.” “To say that possession is hostile should mean nothing more than that it is without **permission** of the one legally empowered to give possession, usually the owner.” Indeed, one who obtains the property owner's **permission** to enter or possess land does not possess the property hostile to that owner's interest.

Henninger at 926-27 (internal citations omitted).

Based upon the foregoing exchange and the other evidence of record, we are ultimately in agreement with the court’s finding that Greer and her family used the driveway and parking area with the permission of the Hicks family. Though the word “permission” is not explicitly used in the exchange, the clear inference from the testimony is that permission was given for the Greers to use the area. *See, e.g., Ryan v. Kanella*, 7 Ky. L. Rptr. 358 (1885). Otherwise, there would be no reason to install a drain to facilitate access.

Accordingly, we find that the court’s determination that the use was permissive to be a finding based upon substantial evidence. Certainly, a reasonable person, reviewing the foregoing exchange, could conclude that the placement of the drain inferred permission. Thus, we are in agreement with the court below that the use of the area in dispute was not sufficiently hostile to support a claim of adverse possession. Accordingly, we affirm.

Having so found, we find it unnecessary to address whether Greer established the remaining elements of adverse possession. Ultimately, even if Greer were able to establish all remaining elements of an adverse possession claim,

such a claim would be defeated by clear evidence of permissive use. *See, e.g., Moore v. Sills*, 307 S.W.3d 71 (Ky. 2010). Moreover, we note that there was dispute as to whether or not the Greers left their property for a period of one year. Our review of the record indicates that there is conflicting evidence on that issue, and as noted hereinabove, regardless of conflicting evidence, or the fact that this Court may 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 that is a task within the exclusive province of the trial court. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

Briefly, we address Greer's remaining two arguments, namely: her assertion that the court incorrectly viewed this case a prescriptive easement case rather than an adverse possession case, and her argument that the court failed to join necessary parties to this matter. Concerning whether the court incorrectly viewed this matter as a prescriptive easement case, we disagree. Our review of the court's initial judgment issued on April 20, 2011, clearly indicates that the court viewed this matter as an adverse possession claim, and treated it as such. While it did address the issue of whether Greer had claims for an easement, this was only with respect to her ingress and egress to the property at issue. Clearly, however, the court addressed the issue of adverse possession of the property at issue in a more general sense and found that Greer failed to meet her burden of establishing same. For the reasons previously stated herein we agree with the court below and, accordingly, affirm.

Finally, concerning Greer's claim that the court failed to join all necessary parties prior to adjudicating her claim, we again disagree. In so doing, we note first that it is the responsibility of the parties, and not the court, to join all necessary parties to a claim. Moreover, our review of the record indicates that while this issue was mentioned in Greer's motion to alter, amend, or vacate the judgment after it was entered, it was unpreserved by any motion during the course of the trial below. Further, the private paved driveway presently used by Greer to access her property is a road used by the Skeans family, and a road different from Sally Stephens Branch which was indeed a public road. Our review of the record indicates no evidence submitted to establish that the private paved driveway used by the Skeans family has been made part of the Floyd County public road system. Accordingly, we believe that no error occurred, and we affirm.

Wherefore, for the foregoing reasons, we hereby affirm the June 21, 2011, order of the Floyd Circuit Court, the Honorable John D. Caudill, presiding.

ALL CONCUR.

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