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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001988-MR

JAMES KATTER AND
GENEVIEVE KATTER — APPELLANTS

v.

APPEAL FROM MENIFEE CIRCUIT COURT
HONORABLE WILLIAM E. LANE, JUDGE
ACTION NO. 11-CI-90061

LAREN PAYNE AND
MARY LOU PAYNE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS AND NICKELL, JUDGES.

NICKELL, JUDGE: James and Genevieve Katter (collectively "Katter") have appealed from a judgment of the Menifee Circuit Court granting an implied easement in two routes across their property for the benefit of a landlocked parcel of property owned by Laren and Mary Lou Payne (collectively "Payne"). After a careful review of the record, we affirm.

The parties are landowners of adjoining parcels derived from a common title from Katter's son, Robert. Katter received his property by deed while Payne obtained his parcel from Community Trust Bank following a bank-initiated foreclosure action against Robert. Robert had initially purchased the entire property, including the areas now owned by Katter and Payne, as a single parcel. He subsequently divided the parent tract into three smaller tracts through a series of conveyances. Robert transferred a ten-acre parcel to Katter, retained the neighboring ten-acre parcel for himself, and conveyed a one-half interest in the remaining lands to Katter. Homes were constructed on each of the ten-acre parcels. Robert subsequently conveyed his one-half interest in the remainder of the land to Katter. After defaulting on his mortgage, Robert's parcel was obtained by Community Trust Bank at a Master Commissioner's sale. Payne purchased the property from the bank.

It is undisputed that Payne's parcel is landlocked and requires crossing Katter's land to access a public roadway. No easement by grant or reservation exists in the chain of title for any of the parcels involved in this dispute. Two roadways exist across Katter's land leading to two separate public roads: one, referred to at trial as the "bad road," to Whites Branch Road, and the other, known as the "good road," to Midnight Pass Road. Both of the roadways were in existence at the time the parcels were severed by Robert, although they have each been greatly improved since that time. The good road passes in front of Katter's home and is level and passable at all times. The bad road follows the topography

of the field across which it travels, traverses over a relatively steep hill, and is passable at times only in a four-wheel drive truck. The two roads intersect a short distance from Katter's home and continue as one to Payne's home. Both parties used the good road for the majority of their travels to and from their respective properties. A dispute arose between the parties resulting in Katter's blocking access to the good road.

Payne initiated the instant action seeking a declaration of their rights to use both roadways across Katter's lands to access their own, and a permanent injunction to prevent Katter from interfering with use of the roads. Payne further sought and received an *ex parte* order requiring Katter to immediately cease blocking or limiting use of the roadway. Katter responded and counter-petitioned for a declaration of rights seeking to enjoin the Paynes from using the good road and requiring them to use and maintain the bad road.

A bench trial was conducted a short time later to determine the parties' respective rights and to allocate expenses relating to upkeep of the roadways. The trial court concluded that both roads were in existence at the time of severance of Payne's tract from the parent tract, and both were apparent and visible at the time Payne purchased the property. Based on the holding in *Hall v. Coffey*, 715 S.W.2d 246 (Ky. App. 1986), the trial court concluded Payne was entitled to an implied easement across both roads, enjoined Katter from interfering with the use of either route, and ordered the costs of maintaining both roads be split between the parties. This appeal followed.

We begin with the standard of appellate review. As 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." CR[1] 52.01. *See also Lawson v. Loid,* 896 S.W.2d 1, 3 (Ky. 1995); and *A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 509 (Ky. App. 1999). Factual findings are not clearly erroneous if supported by substantial evidence. *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998); *Faulkner Drilling Co. Inc. v. Gross*, 943 S.W.2d 634, 638 (Ky. App. 1997); *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 117 (Ky. 1991). Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. *Golightly,* 976 S.W.2d at 414; *Janakakis–Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky. App. 1999) (citing *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972)). "It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence." *Garland,* 805 S.W.2d at 118. 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. *Church & Mullins Corp. v. Bethlehem Minerals Co.*, 887 S.W.2d 321, 323 (Ky. 1992), *cert. denied,* 514 U.S.

[1] Kentucky Rules of Civil Procedure.

1110, 115 S.Ct. 1962, 131 L.Ed.2d 853 (1995). With these standards in mind, we turn to the issues presented on appeal.

Generally, easements may be created by express written grant, implication, prescription or estoppel. *Loid v. Kell,* 844 S.W.2d 428 (Ky. App. 1992). Easements by implication fall into two categories: (1) quasi-easement and (2) easement by necessity. *See generally* Restatement (Third) of the Law of Property §§ 2.11-2.15 (1998). Easements by necessity are borne out of the public policy in favor of the beneficial use of land as opposed to rendering a parcel useless. Necessity of access is the primary factor to be considered in finding the existence of a way by necessity. *Carroll v. Meredith,* 59 S.W.3d 484, 489-90 (Ky. App. 2001). In contrast, quasi-easements arise from the prior land use and are

> 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 490 (internal citations and quotation marks omitted).

Katter contends the trial court erred in concluding Payne was entitled to an implied easement across the good road as it failed to consider the existence of all of the requirements for the creation of such an easement as set forth in *Carroll*. Further, Katter alleges the trial court's reliance on *Hall* was misplaced. We discern no error.

Katter first argues the trial court failed to consider all of the required elements delineated by *Carroll* prior to determining Payne was entitled to an implied easement to the good road. Katter contends the trial court's failure resulted from insufficient proof by Payne on these matters. We disagree.

Documentary evidence was presented establishing the source of title for Katter's and Payne's tracts, common ownership of the dominant and servient

estates, and severance of the unity of title. Katter testified that prior to the separation of title both the good road and the bad road were in existence and were used to travel between what would become the home sites and for ingress and egress to the property. Other witnesses were likewise aware of the existence of both pathways prior to severance and the use of same dating back numerous years before Robert acquired title. The evidence revealed Payne's tract has no direct access to a public road. Without an easement across Katter's land and the accompanying use of the farm roads, Payne's tract would be landlocked. The need for access was created at the time Robert divided the lands and has remained so since that time. Katter testified he and Robert used both roads to access their respective properties although he believed Robert generally utilized the bad road.

The trial court heard conflicting testimony regarding which of the two passways was: the first to be improved; the shorter route to a public road;[2] more commonly used by the parties and their predecessors; and identified to Payne as the means of ingress and egress for the landlocked tract. Conflicting testimony was also received regarding the condition of the bad road and the ability to traverse it in different passenger and commercial/emergency vehicles at various times of the year.

The trial court, as the finder of fact, was tasked with judging the credibility of the witnesses and weighing the evidence presented. Contrary to

[2] Katter contended the bad road was the shorter route by nearly one-half of a mile. His measurements were based on the distance to "blacktop" and discounted the fact that Midnight Pass—although a gravel road—was a county road.

Katter's allegation, sufficient evidence was presented upon which the trial court could base its decision. It has long been held that the trier of fact has the right to believe the evidence presented by one litigant in preference to another, *King v. McMillan,* 293 Ky. 399, 169 S.W.2d 10 (1943), and may believe any witness in whole or in part. *Webb Transfer Lines, Inc. v. Taylor*, 439 S.W.2d 88, 95 (Ky. 1968). The trier of fact may take into consideration all the circumstances of the case, including the credibility of the witness. *Hayes v. Hayes*, 357 S.W.2d 863, 866 (Ky. 1962). Having weighed the evidence in this case, the trial court concluded Payne was entitled to the establishment of a quasi-easement across both the good road and the bad road. Although not specifically discussed in its order, we cannot say the trial court failed to consider the *Carroll* factors, nor can we say its decision was clearly erroneous as substantial evidence was presented to support the ruling. Thus, we discern no error.

Katter next alleges the trial court's reliance on *Hall* was erroneous, again challenging the sufficiency of the evidence. In *Hall*, we restated the general rule that one who conveys a portion of his estate "impliedly grants all those apparent or visible easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed, and which are reasonably necessary for the use of that part." *Hall*, 715 S.W.2d at 250 (quoting *Stone v. Burkhead*, 160 Ky. 47, 169 S.W. 489 (1914)). Katter contends proof was lacking as to the manner in which the passways were utilized prior to the severance of Payne's tract, and thus, the trial court's judgment was clearly erroneous.

It is undisputed that Robert's conveyances to Katter resulted in Payne's tract being landlocked. It is likewise undisputed that both the good and bad roads were in existence—although not in their current form—visible and in use prior to the severance of Payne's tract to service the entirety of the property, specifically including the original home site which was located on what would become Payne's land. Katter admitted the passways were obvious and noticeable at the time he took title from Robert. Thus, it is clear Katter took the land subject to the notorious passways. *See Smith v. Smith*, 304 Ky. 562, 201 S.W.2d 720, 721 (1947). Because the trial court's decision was supported by substantial evidence and comports with controlling precedents, we cannot say it erred in assessing the evidence before it and concluding *Hall* was applicable.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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