RENDERED: DECEMBER 13, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000314-MR

REGINALD CLARKE — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 09-CI-00288

KEVAN EVANS, NANCYE EVANS,
AND EVANS ORCHARD AND CIDER MILL, LLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, STUMBO, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: This is an appeal from a finding of the Scott Circuit Court that there was a prescriptive easement regarding the use of a spring on a property located in Scott County, Kentucky. Based upon the following, we affirm the decision of the trial court.

BACKGROUND SUMMARY

Nancy Evans has been the owner of property which shall be referred to as the "Evans Farm" since September 25, 1959. The second piece of property at issue in this case, the "Clarke Farm," has had several owners throughout the years. On September 30, 1959, it was purchased by Wilson B. Worick, who owned the property until November 16, 1972, when he passed it to his son and daughter-in-law through testate secession. On November 30, 1973, Hall W. Steel & Clay Storage Company purchased the property which they sold to John W. Dabney on March 8, 1976.

This case involves the use of a spring on the Clarke Farm. The trial court found that there was evidence that the owners of the Evans Farm had used the spring since 1960. It concluded that the appellees proved the existence of a prescriptive easement through the "actual, open, notorious, forcible, exclusive, and hostile use of the spring which was in full force for at least fifteen years." *Cole v. Gilvin*, 59 S.W.3d 468 (Ky. App. 2001). It stated that the appellees proved they had continually used the spring for a period of over fifty years and that use of the spring did not place an undue burden on the servient estate. *Commonwealth Department of Fish and Wildlife Resources v. Garner*, 896 S.W.2d 10 (Ky. 1995).

The trial court also found:

> Plaintiffs' prescriptive easement includes use of the spring, dam, pipe bringing water into the spring, pump house, underground pipeline and the right to have access to the same. *McPherson v. Thompson*, 89 S.W. 195 (Ky. App. 1905). The prescriptive easement also includes the

> right of the owners of the dominant estate to repair, improve, and maintain the same as long as it places no undue burden on the servient estate. *Elam v. Elam*, 322 S.W.2d 703 (Ky. 1959).
>
> This prescriptive easement shall run with the land and be binding on the heirs, successors and assigns of the owners of both the dominant estate and the servient estate. It shall continue indefinitely unless terminated by agreement, abandonment, or operation of law.

Opinion at p. 6.

Clarke then brought this appeal.

STANDARD OF REVIEW

Kentucky Rules of Civil Procedure (CR) 52.01 provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given the opportunity of the trial court to judge the credibility of witnesses." Findings are considered to be clearly erroneous if they are manifestly against the weight of the evidence. *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008); *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky.1967).

DISCUSSION

Clarke first contends that the finding by the trial court that the Evans Farm had acquired a prescriptive easement on the spring located on the Clarke Farm was clearly erroneous since the use of the spring has always been permissive and, even if a prescriptive easement had been established, the present use of the spring far exceeds the use established during the era in which it was established by 1974.

In order to establish that a prescriptive easement exists, the moving party must prove that there was an open and hostile, continuous use for a period of fifteen years. *Riley v. Jones*, 174 S.W.2d 530, 531 (Ky. App. 1943). Clarke contends that the use of the spring on his property has always been permissive and, therefore, a prescriptive easement cannot be established under Kentucky law.

The trial court found that explicit permission could not be presumed just because a familial relationship existed between the parties. Clarke argues that until 1973, the use of the spring was by members of the same family and that it was illogical that an owner's allowance of two pump houses to be built on his property for the use of the spring was without permission. Evans argues that although Kevan Evans discussed obtaining a written easement with David Clarke, an easement by prescription did not exist. We believe that *Ward v. Steward*, 435 S.W.2d 73, 75 (Ky. 1968), supports this argument. "The request for a deed would warrant an inference that at that time and thereafter Stewart was not claiming a right to the passway. *Shields v. Patterson*, 170 Ky. 422, 186 S.W. 142. But we do not consider it to have much weight toward indicating that a right never had been claimed during those preceding forty years of use. And the request for a deed could mean only that Steward was hopeful that he could settle his right in that way rather than being compelled to seek a judicial declaration of a "prescriptive right." *Id.*

Ward also held that "…the rule requires the owner of the servient estate to show affirmative permission (either by direct proof or by inference) rather than

merely 'an absence of affirmative claim of right.'" *Id.* The appellees contend that the uninterrupted use of the spring for fifty years by the Evans Farm owners overcame the burden of presumption that the use was not permissive. The *Ward* court also found that cooperation between property owners was insufficient to nullify a prescriptive easement. The trial court in the case at bar found that, based on the evidence, there was no affirmative permission to use the spring. This finding is based on substantial evidence and not clearly erroneous.

Clarke contends, however, that he successfully rebutted the presumption that a prescriptive easement had been established. He argues that the use of *Pickel v. Cornett*, 147 S.W.2d 381 (Ky. App. 1941), by the trial court was in error. Clarke asserts that, in *Pickel*, the court held that there was no evidence of permissive use, only conclusions in the testimony of the appellant. He argues that in this case, however, there was irrefutable evidence of the close family relationships between the owners of the Clarke Farm and the Evans Farm and that it defies logic that Nancy Rees Evans was not granted permissive use of the spring for her needs. The appellees contend that the transfer of the property from Wilson Worick to Nancy Rees Evans included the right to use the spring on the servient estate. Since the only source of water for the dominant estate was the spring, the property could not have been used without this appurtenant right.

Clarke also contends that the trial court erred in finding that the present use of the spring by Evans does not exceed the use during the period that the

prescriptive easement was established, if one accepts that there was a prescriptive easement. The trial court found as follows:

> It has been agreed by the parties that the usage has changed. The Plaintiffs no longer grow tobacco or use the water from the spring for a residence. There are still cattle on the farm, but the primary use of the water now is for the irrigation of the vegetables and the fruit orchard. Kevan Evans testified that the water usage has actually gone down because they use a different system now that pulls less water out of the spring at any given time. Reginald Clarke testified that the spring is used more during the year now with the different use and that based upon the tax returns of the Plaintiffs that the usage must be more. The Court finds that Clarke's evidence is not very credible. It attempts to determine the amount of water usage based upon the increase and income of the Plaintiffs. If this were a valid method, a qualified expert would need to testify to this. The Court further finds that Evans' testimony sounds reasonable and since he is the one pumping the water, he would appear to have a better idea of how much water is being utilized unless contested by competent evidence.

Findings of facts may not be set aside unless they are clearly erroneous, *supra*. The trial court's finding that the spring use had not risen based upon the credible evidence put before it is not in error. Thus, we affirm the decision of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ronald D. Bowling
Lexington, Kentucky

BRIEF FOR APPELLEE:

Rand L. Marshall
Georgetown, Kentucky