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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000606-MR

RUDY MONTANO AND
JEANITTA MONTANO — APPELLANTS

v.

APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 09-CI-00023

KENNETH MCGUIRE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Rudy Montano and Jeanitta Montano own property adjacent to property owned by Kenneth McGuire. Kenneth filed this action in the Rockcastle Circuit Court to enjoin the Montanos from interfering with his use of a claimed easement after the Montanos blocked him from crossing their property to access his property. Following a bench trial, the trial court found the road used by

Kenneth was the same as expressly created by a 1974 deed to one of Kenneth's predecessors in title and dismissed the Montanos' claim for damages to their property. The Montanos appealed.

On March 16, 1974, a deed was executed between Archie McGuire and his wife, Helen McGuire, as grantors, and Lewis McGuire and Flora McGuire, as grantees. The deed, recorded in the Rockcastle County Clerk's office, transferred a .34-acre tract to Lewis and Flora but reserved a "sixteen foot right of way across the land herein conveyed from the Copper Creek Road in to the first parties barn along the fence as is now located."

Subsequently, the dominant estate was transferred by Archie and Helen and eventually purchased in 1995 by Kenneth. The .34-acre tract was transferred to the Montanos in November 2007.

Soon after purchasing the .34-acre tract, the Montanos began blocking the gravel road across their property and leading to Kenneth's property. At that time, the barn on Kenneth's property and referred to in the 1974 deed creating the easement had been torn down and replaced with a house trailer. The Montanos asserted that heavy equipment was driven across their property in an area outside the easement designated in the 1974 deed and more than thirty-five feet from the fence referred to in that deed.

In 2009, Kenneth filed an action in the Rockcastle Circuit Court against Rudy Montano seeking an order preventing Rudy from interfering with his use of the road and a temporary injunction. After both parties filed motions for

summary judgment, the trial court found the easement created in 1974 was an express easement appurtenant to land that was in the chain of title of both parties. Kenneth was ordered to use the easement in a manner that would not cause damage to Rudy's property. The issue of damages for Rudy's interference with the use of the easement and Rudy's counterclaims for damages to his property caused by Kenneth's operation of heavy machinery outside the easement were reserved for later adjudication.

Subsequently, Rudy filed a motion to set aside the interlocutory order and for leave to amend his counterclaim. Rudy's wife, Jeanitta, moved to intervene, which was eventually granted.

The parties submitted briefs on the remaining issues. Among the issues presented by Rudy for adjudication was whether the road used by Kenneth to access his property was the same as reserved in the 1974 deed. During a bench trial, the trial court heard from various witnesses.

Helen McGuire testified that in 1974 she and her husband, Archie, conveyed the .34-acre tract and reserved an easement to access their adjoining farm. After being shown photographs of the disputed road, she testified that the road was in existence when they conveyed the .34-acre tract and is the same road created as an easement in 1974.

Arnold McGuire testified that the road used by Kenneth was the same as it was in the 1960's. It has not changed location and remains the same width.

Kenneth testified the easement location has not changed location. He recalled the road was being used when he purchased his property.

Glenn Ellison testified he has resided on Cooper Creek his entire life. Upon review of a drawing, Ellison stated there had always been a road on the property now owned by the Montanos.

Gary Wayne Holman testified he has lived across the road from the disputed property on Copper Creek since 1969. He recalled the barn and that he surveyed the property where the road in dispute is located. He reviewed an aerial photo and read the easement description and was asked about a fence line. Holman testified that although there was a fence in the area, he did not recall its location or if it was on the neighboring property line. When asked how Archie entered the property adjoining the .34-acre tract, Holman answered "where that driveway is now. As long as I can remember it has always been there."

Jeanitta testified that when she and Rudy purchased the .34 acre-tract in 2007, the road was not being used to access Kenneth's property. In 2008, Kenneth tore down the barn. About that same time, commercial cement trucks were driven on the road. Additionally, a neighbor drove heavy trucks on the road to access his property.

Jeanitta testified that as a result of heavy equipment on the road, her home's septic line ruptured causing sewage to flow into the house and there was damage to the water lines. She testified that the value of the house before the damage was $15,000 and must now be demolished. However, there was no

evidence regarding the cause of the damage and no receipts for repairs or other estimates as to the home's value were submitted.

At the conclusion of the hearing, the trial court found the easement was the road as Kenneth claimed. The Montanos' claim for damages to their property was dismissed.

It is appropriate to begin with our standard of review. Under Kentucky Rules of Civil Procedure (CR) 52.01, in an action tried without a jury, "[f]indings 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." A factual finding is not clearly erroneous if it is supported by substantial evidence. *Owens–Corning Fiberglas Corp. v. Golightly,* 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is evidence that when viewed alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). "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." *Wells v. Sanor*, 151 S.W.3d 819, 822 (Ky.App. 2004).

"An easement may be created by express written grant, implication, prescription or estoppel." *Loid v. Kell,* 844 S.W.2d 428, 429 (Ky.App. 1992). Because the easement was created by the 1974 deed and within the chain of title of the parties, it is an express easement. *Id*. "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." *Dukes v. Link,* 315 S .W.3d 712, 716 (Ky.App. 2010)(quoting 25 Am.Jur.2d *Easements and Licenses in Real Property* § 93 (2004)). As quoted in *Phelps v. Fitch*, 255 S.W.2d 660, 662 (Ky. 1953), the general rule is stated in 28 C.J.S., *Easements*, § 90, p. 769, as follows:

> Where a way is appurtenant to an estate, it may be used by those who own or lawfully occupy any part thereof, and by all persons lawfully going to or from such premises, whether they are mentioned in the grant or not.

The Montanos argue the language creating the easement was unambiguous and, therefore, the trial court was precluded from considering evidence outside the 1974 deed. They contend when the language reserving "a sixteen foot right of way across the land herein conveyed from the Cooper Creek Road in to the first parties' barn along the fence as is now located" unambiguously locates the easement directly adjacent to a fence once located on the property and on the property line of the neighboring property. Consequently, parole evidence in deciding the location of the easement could not be considered.

Extrinsic evidence cannot be admitted to vary the terms of a written instrument in the absence of an ambiguous deed. *Hoheimer v. Hoheimer,* 30 S.W.3d 176, 178 (Ky. 2000). Evidence outside the language of the deed is admissible only to explain a latent ambiguity in a deed. *Thornhill Baptist Church v. Smither,* 273 S.W.2d 560, 562 (Ky. 1954). "A latent ambiguity is one which

does not appear upon the face of the words used, and it is not known to exist until the words are considered in light of the collateral facts." *Id.* (quoting *Carroll v. Cave Hill Cemetery Co.*, 172 Ky. 204, 189 S.W. 186, 190 (1916)).

We disagree that the language unambiguously refers to a fence on the neighboring property line. The operative phrase "as is now located" could refer to a fence or easily be read to refer to the right-of-away as it existed in 1974. A latent ambiguity existed within the description of the easement and parole evidence was properly admitted.

There was more than substantial evidence, and we note virtually undisputed evidence, that well before 1974, the road being used by Kenneth is the same road used by his predecessors in title to access the property he now owns. All witnesses who were familiar with the property when the easement was created testified that the disputed road was used to access the property and, according to Helen, the road is the same road reserved as an easement in the 1974 deed.

Not only was the easement in the Montanos' chain of title but it was obvious and noticeable. Even when the location of an existing easement is insufficiently described in a written instrument, "if the location can be ascertained from evidence extrinsic to the written instrument such as by observation of the obvious location and extent of the easement, the insufficient written description will not prevent enforcement of the easement." *American Nat. Bank & Trust Co. v. Grimes*, 460 S.W.2d 11, 14 (Ky. 1970). In this case, the evidence established the location of the easement as being the same as it existed in 1974.

An easement without a specified term grants the right to use an easement forever, unless "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 v. Long Valley Farm Kentucky Inc*., 804 S.W.2d 15, 16 (Ky.App. 1991). Nevertheless, the Montanos contend Kenneth abandoned the easement by its nonuse.

Forfeiture of an express easement is not favored in the law and its mere nonuse is insufficient to demonstrate an intention to abandon the easement. *City of Harrodsburg v. Cunningham*, 299 Ky. 193, 198, 184 S.W.2d 357, 359 (1945). In light of the finding that the easement is the road used by Kenneth, there is overwhelming evidence that neither Kenneth nor his predecessors in title abandoned the easement. Having reviewed the evidence, we cannot say the trial court's finding of fact that the easement was not abandoned was clearly erroneous.

The Montanos are correct that easements may not be enlarged or extended so as to increase the burden upon, or interfere with, the servient estate. *Commonwealth, Dept. of Fish & Wildlife Resources v. Garner,* 896 S.W.2d 10, 14 (Ky. 1995). The use of the easement must be as reasonable and as little burdensome to the landowner as the nature and purpose of the easement will permit. *Id.*

Although the barn once accessed by the road was torn down, the testimony was that the road was used to access the farm, not only the barn. Additionally, as noted by the Court in *Sawyers v. Beller*, 384 S.W.3d 107, 111 (Ky. 2012), where,

as here, the express easement is unrestricted, the owner of the easement "is not strictly limited to using the pass way only for purposes for which it had been historically used." The easement is currently being used for the same general purpose of accessing the property once owned by Archie and Helen and now owned by Kenneth.

However, Kenneth is not permitted to use the easement in such a manner as to be unreasonable and overly-burdensome to the Montanos' property. Jeanitta testified that heavy equipment being driven over the easement to the trailer now located on Kenneth's property ruptured sewage lines causing sewage to flow into the house. She further testified water lines were damaged.

Although she described the alleged damage and testified that the value of the house before Kenneth started driving heavy equipment over the easement was $15,000 and now must be demolished, there was no expert testimony that Kenneth's actions were the cause of that damage. Moreover, Jeanitta testified that the cement trucks were commercial trucks and that a neighbor had also driven heavy equipment on the road. Based on the lack of evidence regarding causation, we must affirm.

Because we affirm the trial court's finding that the express easement created by the 1974 deed is the road as it existed in 1974 and the same road now used by Kenneth as access to his property, the issues presented on appeal as to whether there is a prescriptive, quasi, or an implied easement are moot.

For the reasons stated, the order of the Rockcastle Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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