

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000082-MR

GLENN MCGLONE AND
JUDY MCGLONE, husband and wife;
AND CHARLES FARLEY AND
KATHY FARLEY, husband and wife

APPELLANTS

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
ACTION NO. 09-CI-00950

K.C. HARDIN, JR. AND
PAULINE HARDIN, husband and wife

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, NICKELL, AND VANMETER, JUDGES.

VANMETER, JUDGE: Glen and Judy McGlone and Charles and Kathy Farley (hereinafter collectively “McGlone appellants”) appeal from the Greenup Circuit Court’s order holding that a passway, Catherine Street, has not been abandoned

and therefore remains a right-of-way, which must be kept free of obstruction. For the following reasons, we affirm.

I. Factual and Procedural Background

The McGlone appellants each own a lot and a home in the Hardin subdivision. K.C. and Pauline Hardin (the Hardins) own approximately twenty-six acres, which abuts the northwestern side of the Hardin subdivision and the northern end of Catherine Street. The subdivision was divided into plats, and the plat was filed with the county in 1953.

The recorded plat contains a dedication of the streets in the neighborhood to public use by the owners of the subdivision, Monroe and Vesta Maybel Hardin.¹ Many of the original lots were sold by auction in 1953, and all of the lots and streets were marked on the ground with wooden stakes. A copy of the plat was also available to prospective purchasers.

Catherine Street, which is marked as “Unnamed Street (formerly Catherine Street)” on the plat, runs directly between the homes of the McGlone appellants. This portion of Catherine Street, going north from Moore-Craycraft Road (formerly First Street), is unpaved grass, and is currently being used as part of the McGlone appellants’ yards. The portion of Catherine Street to the South of Moore-Craycraft Road is a graveled street.

The McGlone appellants have access to their properties by going north on Dickerson Road (formerly Monroe Street) from U.S. 23, turning east on

¹ The aunt and uncle of K.C. Hardin, Jr., one of the appellees.

Moore-Craycraft Road, and then turning north on Catherine Street. The Hardins own the property at the northernmost end of Catherine Street, and have a cattle gate at the entrance to their property, which encloses the northernmost 100 feet at the end of Catherine Street. The cattle gate is not locked, and someone wishing to traverse this end of Catherine Street can open the gate. No house sits north of the gate, and the Hardins own both lots on either side of Catherine Street north of the gate.

In 2009, the McGlone appellants parked an SUV and a trailer on the grass portion of Catherine Street between their homes, blocking the right-of-way. This grass portion of Catherine Street is about 12 feet from the Farley residence; however, the Farleys have also built a shed on the side of their residence that comes within two feet of the passway. When Charles Farley built the shed on his property line in 2007, he obtained a copy of the original plat, and was thus aware of the location of this grass portion of Catherine Street. The McGlone appellants have also posted a staked sign between the houses stating “Posted Private Property.”

When the McGlone appellants first began blocking this portion of Catherine Street, the Hardins sent a letter to the McGlone appellants asking that they stop encroaching Catherine Street. The McGlone appellants declined to clear the passway, and this suit ensued.

The Hardins initially filed for summary judgment, which the trial court granted. The McGlone appellants filed a motion to alter, amend, or vacate,

and the trial court reversed its decision and vacated the summary judgment. A bench trial was then held in August 2014, and the trial court heard testimony from registered land surveyor, Anthony Keibler, as well as Danny Hayden, Jim Myers, Virgil Lewis, and K.C. Hardin on behalf of the Hardins, and Duane Hardin, Greg Holbrook, and Charles Farley on behalf of the McGlone appellants. The trial court also considered the original plat on record in the Greenup County Clerk's records, which included a certification of the owners of the subdivision at that time, dedicating the streets shown on the plat as rights-of-way for the use of the public, as well as the deeds for the Hardins' tract, and both of the McGlone appellants' tracts. The trial court made the following findings of fact, in relevant part:

That the evidence establishes that a portion of Catherine Street and Moore-Craycraft Road going northerly to the Hardin gate has not been utilized much in the last several years, although Danny Hayden testified that he had driven his truck from Dickerson Road (formerly Second Street), south on the disputed road to Moore-Craycraft Road in 2007. He also testified he had utilized the Right-of-way several times over the years and that he was 13 years old when the original auction took place in 1953. He was the grandson . . . of the original developers of the subdivision. He stated that it was well known that the right-of-way was there and he never saw any obstructions to this right-of-way and was able to drive his truck on it.

. . . .

K.C. Hardin testified he had used the right-of-way many times over the years and that he had walked on it many times in the last few years. He stated that he built his fence in 2005 and somewhere around that time he and his wife were walking along Catherine Street and saw that the Farleys were installing a septic tank . . . and that

he and his wife stopped and talked to Mrs. Farley, who is a [McGlone appellant] in this action and that he told her “you do know there is a street here” and Mrs. Farley responded “oh yes, I know that.”

That the evidence establishes that a shed that was built onto the Farley home comes to within one (1) foot of the westerly right-of-way line of Catherine Street; but that Mr. Farley stated that he added that to the residence after he purchased the home and that he knew that Catherine Street was there.

That Farley testified that Catherine Street was grown up with weeds and saplings that made it not readily passable and he introduced photographs demonstrating the type of vegetation that was on the right-of-way, but the testimony establishes that most, if not all, of those pictures were facing north or north westerly and that Catherine Street was to the east of the Farley home.

That it has been established for at least a few years the right-of-way of Catherine Street which is in dispute in this case was not used or not used very much, but there has been no establishment of adverse possession or any act on behalf of the Hardins that would indicate they were abandoning their claim to use the right of way.

There was also testimony that Glen McGlone and a neighbor, Mike Sutton, had utilized the right-of-way of Catherine Street which is now in dispute to access a metal barn or building on the rear of the McGlone property in recent years.

The trial court held that, although Catherine Street has not been used or not been used much for a period of years, no showing has been made of any intent to abandon the property on the behalf of the Hardins, nor have the McGlone appellants made a showing of adverse possession. The trial court ordered that the McGlone appellants be enjoined from attempting to block or interfere with this right-of-way, which is for the use and benefit of the public. From this order, the McGlone appellants appeal.

II. Standard of Review

For a case tried without a jury, the trial court's 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 52.01; *Cole v. Gilvin*, 59 S.W.3d 468, 472 (Ky. App. 2001). A factual finding is not clearly erroneous if supported by substantial evidence. *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky.1998). Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. *Id.* The fact-finder is “to determine the credibility of witnesses and the weight to be given the evidence.” *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 118 (Ky. 1991). “On appeal of a verdict from a bench trial, we review the lower court's findings of fact for clear error and its legal determinations *de novo*.” *Arnold v. Patterson*, 229 S.W.3d 923, 924 (Ky. App. 2007) (*citing Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005)).

III. Analysis

The McGlone appellants make two arguments on appeal. First, the McGlone appellants argue the trial court erred in requiring a showing of an intent to abandon Catherine Street in order for it to be abandoned. Second, they argue the trial court erred in not finding that the Hardins were estopped from arguing that Catherine Street be opened when the Hardins admitted they had a gate blocking access to the northern most portion of Catherine Street.

First, the McGlone appellants cite *Sarver v. Allen Ctny.*, 582 S.W.2d 40 (Ky. 1979), to contend that intent to abandon is not required to prove abandonment; rather, all that is required is non-use by the general public for fifteen years. In this case, the McGlone appellants argue that from 1985 – 2007, the contested portion of Catherine Street was never used, and after 2007, the road was only used on a few occasions, and not by the general public.

Sarver states “[a] public road that is not a ‘county road’ can be abandoned without formal action. When the public has acquired the free use of a roadway by user, as appears to be the case with respect to this old shortcut, it may abandon that right by a long period of nonuser.” 582 S.W.2d at 42 (internal citations omitted). However, *Sarver* applies this doctrine of abandonment to easements and rights-of-way created by prescription, which is distinct from those rights-of-way created by formal deed, as is the instant case. Both parties agree that the original plat, recorded and certified by the Greenup County Clerk, showing Catherine Street, contains a recitation which “dedicate[d] to the public use the streets therein shown.”

Mere nonuse

“alone does not create an abandonment of an easement which has been acquired by grant . . . The cases are agreed that at least where a right of way or other easement is created by grant, deed, or reservation, no duty is thereby cast upon the owner of the dominant estate thus created to make use thereof or enjoy the same as a condition to the right to retain his interest therein; the mere nonuser of an easement will not extinguish it. In fact, it is held that even nonuser for the length of the

prescriptive period does not operate to extinguish an easement created by grant, deed, or reservation.

Schade v. Simpson, 295 Ky. 45, 173 S.W.2d 801, 803 (1943) (internal citations and quotations omitted). Abandonment of an easement or right of way granted by deed requires clear evidence of intent to abandon, not merely nonuse. Accordingly, the trial court properly concluded that absent intent to abandon, the granted right of way across Catherine Street could not be abandoned by the public by nonuse.

Second, the McGlone appellants argue that the trial court erred in allowing the Hardins to argue that they should not be able block a portion of Catherine Street, when the Hardins had in fact built a fence on part of this very street. The trial court, after careful review, made the distinction between placing an SUV and utility trailer to block the right-of-way coupled with a “Posted No Trespassing” sign, as the McGlone appellants have done, and an easily-opened cattle gate intended to contain cattle, not block travelers of the road, as the Hardins have done. Furthermore, the Hardins are not seeking to enjoin others from using the small portion of Catherine Street that extends north of their gate; the Hardins also own all of the land north of the gate, to both sides of Catherine Street. The trial court did not clearly err in its findings of fact nor in allowing the Hardins to proceed with this argument.

IV. Conclusion

For the foregoing reasons, we affirm the order of the Greenup Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffrey D. Hensley
Flatwoods, Kentucky

BRIEF FOR APPELLEE:

Roger R. Cantrell
Greenup, Kentucky