RENDERED: MARCH 8, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000451-MR

BOBBY JONES, SR. APPELLANT

v.

APPEAL FROM WEBSTER CIRCUIT COURT
HONORABLE C. RENE' WILLIAMS, JUDGE
ACTION NO. 15-CI-00037

LEROY PAPINEAU APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, GOODWINE, AND MAZE, JUDGES.

DIXON, JUDGE: Bobby Jones, Sr., appeals from the Webster Circuit Court's final order and judgment following a jury trial, granting him quiet title to his land subject to a prescriptive easement for Leroy Papineau to use a driveway off Highway 109 across Jones's land to access his land. Finding no error, we affirm.

Jones and Papineau own adjoining tracts of land. Papineau and his predecessors in title used an L-shaped driveway off Highway 109 over a portion of Jones's and his predecessors in title's property, dating back as far as the 1960s, to access the land and residence located on Papineau's property. In 2014, Jones conducted a survey of his property and, thereafter, constructed a fence on the edge of his property and across the driveway. Jones's refusal to remove the fence from obstructing the driveway prompted Papineau's quiet title action. Jones filed a counterclaim to quiet title in his name. The action culminated in a jury trial following which the jury returned a special verdict that "Papineau, and/or his predecessors in interest had unobstructed, open, peaceful, and continuous use for a period in excess of 15 years over a driveway, a portion of which is across the real property of [Jones]." Based on this verdict, the trial court entered a trial order and judgement quieting the title to Jones with a prescriptive easement to Papineau. Jones was also enjoined from erecting or constructing an obstruction to the use of the driveway. Jones appeals, asserting: (1) the record does not establish a use sufficient to acquire a prescriptive easement; and (2) there is no record to support an easement by estoppel.

As an initial matter, in contravention of CR[1] 76.12(4)(c)(iv) and (v), which require ample references to the trial court record supporting each argument,

[1] Kentucky Rules of Civil Procedure.

neither of Jones's briefs contain any such references in their argument sections aside from the statements of preservation—which only cite the notice of appeal. This simply does not constitute ample citation to the record.

Failing to comply with the civil rules is an unnecessary risk the appellate advocate should not chance. Compliance with CR 76.12 is mandatory. *See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike Jones's briefs or dismiss the appeal for his failure to comply. *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990). While we have chosen not to impose such a harsh sanction, we caution counsel such latitude may not be extended in the future.

The standard of appellate review in land dispute actions is well-established:

> factual findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [trier of fact] to judge the credibility of the witnesses." A factual finding is not clearly erroneous if it is supported by substantial evidence. Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people. "It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence." 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.

Cole v. Gilvin, 59 S.W.3d 468, 472-73 (Ky. App. 2001) (internal footnotes omitted).

The crux of this case is whether the jury's finding of a prescriptive easement is supported by substantial evidence. On careful review, we hold the jury's findings and, therefore, the trial court's orders are supported by substantial evidence. We further hold the trial court did not clearly err or abuse its discretion.

First, Jones argues the record does not establish sufficient use to acquire a prescriptive easement.

> The law of prescriptive easements is derived from the principles underlying adverse possession of property interests generally. As a general matter, in order to obtain a right to a prescriptive easement, a claimant's adverse use must be "actual, open, notorious, forcible, exclusive, and hostile, and must continue in full force . . . for at least fifteen years." A prescriptive easement is a property right in one landowner (dominant tenement) representing a privilege to use the land of another (servient tenement) and is based on a presumed grant that arises from the adverse, uninterrupted, and continued use for a 15-year statutory period. "[T]he adverse possession of a grantee may be tacked on to that of his grantor to complete the statutory period."
>
> In *Pickel v. Cornett*, [285 Ky. 189, 147 S.W.2d 381 (1941),] the former Court of Appeals noted that while the elements for obtaining a prescriptive easement were similar to those for obtaining a fee simple title to land by adverse possession, the former represented an incorporeal hereditament with a **less stringent standard of use.**

> A private passway may be acquired by prescriptive use although a right of way is not strictly a subject of continuous, exclusive, and adverse possession. **It is sufficient if the use exercised by the owner of the dominant tenement is unobstructed, open, peaceable, continuous, and as of right for the prescribed statutory period.**

Cole, 59 S.W.3d at 475 (emphasis added) (internal citations omitted). This is precisely what the jury found and the trial court adopted in its order and judgment. These findings were supported by substantial evidence in the form of testimony of the parties and additional witnesses.[2] Jones's failure to accept these findings, which perfectly coincide with the applicable law concerning prescriptive easements, changes neither the facts nor the law.

Continuous use of a right of way without interference for the prescribed statutory period establishes a presumption that the right of use exists under a claim of right, and the burden then shifts to the opposing land owner to

---

[2] Papineau called two additional witnesses, Terri Ann York and Joey Phillips. York grew up near these properties from 1966 to 1985 and recalled the owner of Papineau's property at the time was an elderly lady named Ora Belle Forte who used the subject driveway. Phillips has resided near the subject properties for nearly 50 years and testified that after Ms. Forte was placed in a nursing home, the property was occupied by Joe Dudley. Both witnesses testified to the use of the gravel road by occupants and visitors and that, to their knowledge, prior to 2014 the driveway had never been blocked.

We also here note that although Papineau lived on his land since 1999, he was not the owner of his land until 2003. However, this is of no consequence to his claim for a prescriptive easement because "the adverse possession of a grantee may be tacked on to that of his grantor to complete the statutory period." *Martin v. Kane*, 245 S.W.2d 177, 178 (Ky. 1951).

rebut the presumption by presenting evidence showing the use was permissive. *Id.* Evidence that another access way exists is not an adequate defense. *Lexington & E. Ry. Co. v. Hargis*, 180 Ky. 636, 203 S.W. 525 (1918).

Jones's reliance on *Bob's Ready To Wear, Inc. v. Weaver*, 569 S.W.2d 715 (Ky. App. 1978) in support of his "license" and permissive use theories is simply misplaced for many reasons, the primary of which being that case did not involve a prescriptive easement but rather, a question as to whether there existed an easement by implication, necessity, or license. In discussing *Weaver*, another panel of our Court observed—contrary to what Jones asserts:

> There are Kentucky cases, including *Bob's Ready to Wear, Inc. v. Weaver*, 569 S.W.2d 715 (Ky. App. 1978) holding that one isn't required to show "absolute necessity" for access to their property, but that "all that is required is that the easement be reasonably necessary." In that case the court stated that the fact that one of the parties had other access to their store "is not an automatic bar to their claim to an easement by implication to the parking lot."

Carroll v. Meredith, 59 S.W.3d 484, 488 (Ky. App. 2001). Moreover, Jones provided no evidence that Papineau or his predecessors had used other methods to access the property until after Jones's construction of the fence in 2014.

Furthermore, Jones's contention that construction of the fence served as a revocation of any prior permission—or license—for Papineau to use the driveway and prevented him from procuring a prescriptive easement is also

without merit. Jones testified that he believed Papineau and the other witnesses all lied to the jury in their testimonies. Both Papineau and Jones testified that Jones never gave permission to Papineau to use the driveway. Papineau testified that the previous owners of Jones's property never gave him permission to use the driveway either.[3] Jones admitted he had no personal knowledge concerning any prior dealings between his predecessors in title and Papineau concerning the property and use of the driveway. Without credible proof of permissive use, neither the jury nor the trial court erred in finding Papineau met his burden to establish the existence of a prescriptive easement. This finding was supported by substantial evidence and shall not be disturbed.

Second, Jones argues there is no record to support easement by estoppel. Jones's argument consists of only tangential theories with little or no application of the facts to any legal precedence. We will not search the record to construct Jones's argument for him, nor will we go on a fishing expedition to find support for his underdeveloped arguments. "Even when briefs have been filed, a reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors." *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979). Regardless, we discern no error in the finding of a prescriptive easement, therefore, any discussion of the applicability of estoppel is unwarranted.

[3] The Vanleers owned the property immediately prior to Jones from 1999 to 2008.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Harry L. Mathison
Henderson, Kentucky

BRIEF FOR APPELLEE:

Wm. Clint Prow
Providence, Kentucky