RENDERED: DECEMBER 6, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001797-MR

CHARLES GARY MCCOY — APPELLANT

v.

APPEAL FROM BATH CIRCUIT COURT
HONORABLE WILLIAM LANE, JUDGE
ACTION NO. 16-CI-90034

JOE R. PRICE AND
KIM HUNT PRICE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; NICKELL[1] AND L. THOMPSON, JUDGES.

NICKELL, JUDGE: Charles Gary McCoy appeals from the Bath Circuit Court's judgment entered May 4, 2017, as amended and supplemented by separate order on November 19, 2018. Following a bench trial, the trial court issued its judgment

[1] Judge C. Shea Nickell authored this opinion prior to being sworn in as a Justice with the Supreme Court of Kentucky. Release of this opinion was delayed by administrative handling.

which denied the establishment of an easement on property owned by Kim and Joe Price for the benefit of McCoy's neighboring property. After careful consideration, we affirm the judgment.

The parties own adjoining tracts of rural property in Bath County, Kentucky. Neither party resides on the properties at issue, and neither party's deed carries an easement for the benefit of the other. The McCoy property consists of approximately fifty-three acres with woods and ponds, which McCoy uses for recreational camping, hunting, and fishing. The Price property consists of approximately one hundred eleven acres, which the Prices use as farmland. McCoy's tract lies to the north of the Price tract, and both properties are bound on the west by Slate Creek. The boundary separating the two properties is Skillet Branch, a wide, shallow stream which flows from east to west into Slate Creek. A county road, Skillet Branch Road, runs east from the Peasticks Road area to its westernmost point, where it meets Skillet Branch. This junction occurs next to property owned by Dean Goldie,[2] which lies east of the McCoy and Price tracts. There is no county road continuing to the west of the Goldie property; the county's Skillet Branch Road stops where Skillet Branch begins.

At issue in this case is McCoy's access to his property on Skillet

[2] Dean Goldie's name is spelled "Goldy" in numerous places in the record. Based on a property valuation administrator's map, we have identified him as "Goldie" throughout this Opinion.

Branch. McCoy's tract is almost entirely landlocked; the only current way to access the property is to drive in Skillet Branch. McCoy contends part of Skillet Branch is too rough for a vehicle to travel. Because of this alleged impassability, he asserts he has habitually, since 1980, used a portion of the Price property to go around the rough area of Skillet Branch to access his tract. When the Prices became aware of McCoy's travel in 2015, they erected a fence and gate preventing further unauthorized intrusions on their land from Skillet Branch. McCoy thereafter filed suit, claiming he was entitled to an easement by necessity, an easement by prescription, or a quasi-easement allowing passage through the Price property.

To understand the source of the parties' disagreement, some background is necessary. Until almost forty years ago, Skillet Branch comprised part of a commonly utilized pathway for travel through the area; however, the parties disagree as to the exact location of the pathway through the watercourse. According to the Prices, local residents traveled from the Peasticks Road area in the east, thence to Skillet Branch Road, then drove entirely in the bed of Skillet Branch until they came to Slate Creek. Upon fording Slate Creek, a vehicle could thereafter turn onto Highway 111. This general practice ceased at some point in the 1980s when the Kentucky Department of Highways placed a guardrail at the previous turn-in location on Highway 111.

McCoy's account of the pathway differs from the Prices' account in that he asserts the pathway was not confined to the bed of Skillet Branch. According to McCoy, the middle section of the stream has multiple steep "ledges" or drop-offs, and these ledges prevent vehicles from readily traversing this section of the creek bed. Contrary to the Prices' narrative, McCoy asserts the county previously maintained a pathway on the Price property, running for about two hundred yards along the southern side of Skillet Branch ("the Price bottom"). By traversing the Price bottom alongside the waterway, McCoy avoided the rough ledges before reentering Skillet Branch downstream. McCoy's access point to his property is directly across from where the pathway reenters Skillet Branch from the Price bottom. Until one reaches this access point, McCoy's bank along Skillet Branch is enclosed by a rock wall. McCoy asserts he has consistently and frequently used the Price bottom to access his property since he bought his Skillet Branch tract in 1980.

The Prices contend they had no knowledge McCoy used their property to access his tract until the fall of 2015, when they noticed someone had bulldozed the pathway in the Price bottom, causing damage to their hayfield. Unlike McCoy's characterization of the pathway as a former county road, the Prices describe the pathway as one of many dirt trails running all over their farm. When the Prices noticed the bulldozing damage, they placed the aforementioned fence

and gate on their property along the stream. On July 14, 2016, McCoy moved the trial court for a temporary injunction restraining the Prices from preventing entry to his property using the Price bottom. After a hearing, in which the trial court received evidence and testimony from the parties and their associates, the trial court denied McCoy's motion.

The matter proceeded to a bench trial on March 29, 2017. Much of the testimony and evidence presented during the temporary injunction hearing was repeated during the bench trial. However, there was a significant difference between the two testimonies presented by Harold Bailey. Bailey, a longtime friend of McCoy's, had formerly owned the McCoy and Price properties in a short period of common ownership. Bailey owned the McCoy tract from about 1979 to 1980, when he sold it to McCoy, and he also owned the Price tract from about 1976 to 1988, when he sold it to Everett Hunt, a member of Kim Price's extended family. The Prices took possession of their tract in 2004.

According to Bailey, he always traveled the Price bottom to gain access to the McCoy property during his period of ownership. When questioned telephonically by McCoy's counsel during the temporary injunction hearing, Bailey stated he gave McCoy permission to use the Price bottom pathway. Later, during the bench trial, Bailey testified in person and recanted this previous statement. Bailey stated he could not hear well during his previous telephonic

testimony. He explained he never explicitly gave McCoy permission to travel in the Price bottom; he did not think it was necessary to give permission because he believed the path was a public right-of-way.

Aside from Bailey, several of McCoy's friends, employees, and relatives testified consistently with McCoy regarding access to the McCoy property. One individual working for McCoy, Elmer Hunt, admitted he had taken a bulldozer across the Price bottom, but he denied bulldozing the roadway. He claimed he only "skimmed the grass" as he drove the equipment through and did not allow the blade to touch the ground.

Kim and Joe Price testified how they had no inkling McCoy was using the Price bottom to travel to his property. The Prices admitted erecting a fence and gate after they discovered the damage to their land in 2015. They also averred travel through the Price bottom was not part of accepted local practice, as the Skillet Branch was traversable in a vehicle for its entire length. As support, they introduced video recordings into evidence showing the Prices driving a truck or sport utility vehicle[3] and a farm truck up and down the stream.

Aside from Kim and Joe Price, the Prices presented testimony from two retired Bath County road workers who stated, to the best of their belief, the

[3] The record uses the term "GMC Denali" to refer to the Prices' vehicle. "Denali" may refer to a variety of GMC vehicle models encompassing trucks and sport utility vehicles.

county had never maintained the path along the Price bottom. Other individuals, including Kim Price's father and Dean Goldie, testified how area individuals historically utilized the pathway through Skillet Branch without detouring through the Price bottom. Goldie also asserted he never saw county road crews doing any maintenance beyond the point where Skillet Branch Road terminates. Goldie also testified how McCoy had at one point approached him about purchasing an easement through his property, and Goldie denied the request. The Prices' witnesses testified they had never seen McCoy traveling through the Price bottom to reach his tract.

Finally, the Prices presented testimony from Chris Snedegar, a local heavy equipment operator and construction worker. He testified the damage to the Price farm included the bulldozed pathway, but also rocks removed from the bank on the Price side of Skillet Branch. In Snedegar's opinion, the creek needed to be straightened and the banks built back up, and the cost to do this repair work would be approximately $3,450. When questioned about how much it would cost to place an entrance to McCoy's property across from the Price bottom, where there is currently a rock wall, Snedegar opined it would cost about $800. On cross-examination, Snedegar admitted placement of an entrance on McCoy's property could possibly erode McCoy's bank.

In its judgment of May 4, 2017, the trial court focused on the substantial factual issue of ascertaining "the exact route the Skillet Branch Road passway took, particularly whether it traveled across Price farm bottom." In doing so, much of the trial court's factual findings noted a lack of credibility it attributed to McCoy's witnesses and evidence. The trial court specifically found aspects of McCoy's testimony not credible, including how often he allegedly visited his Skillet Branch property. The trial court also found the photographs of the Price bottom pathway were not taken when McCoy swore they were taken, due to the presence of out-of-season foliage in the photographs. The trial court found Elmer Hunt's testimony, in which he denied causing damage to the Price farm, to not be credible. The trial court did not find Bailey's recantation of his previous testimony credible, focusing on how Bailey specifically and unquestionably stated McCoy had asked for permission to drive on the Price bottom, and Bailey granted McCoy such permission.

In contrast, the trial court found the former Bath County road workers persuasive when they testified as to having no knowledge of any county road work performed beyond Skillet Branch Road or on the Price bottom. The trial court was also persuaded by testimony from Kim Price, Joe Price, Kim Price's father, and Rick Fugate, a deputy sheriff who had also previously rented the Price farm. All of these individuals testified they had never seen anyone, including McCoy or his

friends and relatives, traveling through the Price bottom. Finally, the trial court found the video recordings to be credible evidence supporting the Prices' position. Despite McCoy's, Bailey's, and Elmer Hunt's claims asserting Skillet Branch was impassable, the videos showed vehicles traversing the length of the stream.

In its conclusions of law, the trial court found there was no easement by necessity, due to the demonstrated ability of a vehicle to travel down Skillet Branch to McCoy's access point. The trial court also pointed out McCoy could create his own access point through the rock wall bounding his property. The trial court also found there was no easement by prescription, finding McCoy's use of the Price bottom was not open, visible, adverse, or hostile. In further denying the prescriptive easement, the trial court also pointed out a prescriptive easement may not arise if the use originates by permission of the owner of the servient property. The trial court awarded $3,450 in damages to the Prices.

McCoy subsequently moved the trial court to alter, amend, or vacate its judgment. In its order entered November 19, 2018, the trial court granted the motion to the limited extent it had not ruled on McCoy's claim of quasi-easement. The trial court made the following explicit factual finding:

> The Court having heard the testimony of the parties and witnesses, having viewed the video of vehicles traveling the length [of] Skillet Branch in the stream at the previous hearing and having personally inspected the property, finds Skillet Branch Road is traversable by vehicle from the point it enters Skillet Branch, the

> stream, to the point the stream enters Slate Creek, which includes the distance from the point the Road enters the stream to the McCoy property, and the entire southern boundary of McCoy thereafter. The vehicle would have to be a pickup truck, a low riding car could not travel in the stream. However, the entire length of Skillet [B]ranch requires a pickup to travel not just the distance that McCoy claims travels through the Price property.

After considering the question, the trial court found grant of a quasi-easement requires the use to be "reasonably necessary," and McCoy's use did not qualify based on the reasonable accessibility of his property by way of Skillet Branch. This appeal followed.

McCoy contends the trial court erroneously denied establishment of an easement on the Price property for the benefit of McCoy's neighboring property. Because this case went to trial 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[.]" *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001) (quoting CR[4] 52.01). Factual findings are not clearly erroneous when supported by substantial evidence; however, "[a]n appellate court reviews the application of the law to the facts and the appropriate legal standard *de novo*." *Id*. McCoy argues the trial court should have found the existence of an implied easement by necessity, a

[4] Kentucky Rules of Civil Procedure.

prescriptive easement, or a quasi-easement. Finally, McCoy also argues the trial court erroneously awarded damages against him, asserting there was no evidence he was responsible for the damage to the Price property. We consider each argument in turn.

McCoy first argues the trial court should have found existence of an easement by necessity, contending his property is inaccessible without the ability to drive on the Price bottom to reach his access point. "The three prerequisites to creation of an easement or way of necessity are (1) unity of ownership of the dominant and servient estates; (2) severance of the unity of title by a conveyance of one of the tracts; and (3) necessity of the use of the servient estate at the time of the division and ownership to provide access to the dominant estate." *Id*. at 491 (footnote omitted). The third requirement is particularly important; Kentucky law requires a finding of "strict" or "absolute" necessity to justify easements of this type. *Id*. Based on the trial court's personal inspection of the area, witness testimony, as well as video evidence, there is substantial evidence in this case demonstrating Skillet Branch provides access to the McCoy property. Although McCoy may find it more convenient to drive through the Price bottom, "[a] way of necessity generally will not be implied if the claimant has another means of access to a public road from his land however inconvenient." *Id*. (footnote omitted).

In arguing in favor of necessity, McCoy contends Skillet Branch is not passable in a passenger car. However, in *Gosney v. Glenn*, 163 S.W.3d 894 (Ky. App. 2005), we considered a similar question in which the claimant argued an alternate route was only traversable by tractor or four-wheeler, and therefore an easement by necessity should apply to the disputed passageway. *Id*. at 901. We concluded existence of this difficult alternate route nonetheless meant the claimants failed to establish there was no other access. *Id*. Applying this reasoning, even if Skillet Branch were as difficult to access as McCoy claims, its existence as a pathway to his property precludes an easement by necessity to his tract. "Easements are not favored and the party claiming the right to an easement bears the burden of establishing all the requirements for recognizing the easement." *Carroll*, 59 S.W.3d at 489-90 (footnote omitted). The trial court did not err in finding McCoy is not entitled to an easement by necessity.

In his second argument, McCoy contends the trial court erroneously failed to recognize an easement by prescription across the Price bottom.

> 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.

Cole v. Gilvin, 59 S.W.3d 468, 475 (Ky. App. 2001) (footnotes and internal quotation marks omitted). Kentucky has a "long-held policy of disfavoring prescriptive easements." *Allen v. Thomas*, 209 S.W.3d 475, 481 (Ky. App. 2006) (citation omitted). "[T]he burden to prove all requirements of a prescriptive easement falls upon the party seeking it, and said requirements must be clearly established by the facts[.]" *Id*. at 482.

McCoy argues he used the Price bottom to access his property in an open and notorious manner longer than the fifteen-year requirement. The trial court found McCoy's use was not sufficiently open and visible, stating "[t]ravel over unenclosed woodland will rebut a presumption of prescriptive use," and citing in support for this principle *Pasley v. Hainline*, 272 Ky. 404, 114 S.W.2d 472 (1938). The trial court explained no one had any knowledge or reason to know of McCoy's usage until the bulldozing of the pathway in 2015. The trial court also explained how McCoy could not establish a prescriptive easement because his usage began with Bailey's permission, who owned the servient estate at the time.

"The uninterrupted, continued, and unexplained use of a passway for 15 years or more raises the presumption that such use was under a claim of right and casts upon the owner of the servient estate the burden of showing that the use was merely permissive." *Cox v. Blaydes*, 246 Ky. 121, 54 S.W.2d 622, 624 (1932) (citations omitted); *Cole*, 59 S.W.3d at 475. "The right to use a passway as a

prescriptive easement cannot be acquired no matter how long the use continues if it originated from permission by the owner of the servient tenement." *Cole*, 59 S.W.3d at 476 (footnote omitted). Here, the trial court found McCoy's initial use of the Price bottom was permissive based on Bailey's testimony during the temporary injunction hearing. The trial court did not credit Bailey's recantation during the bench trial. We defer to the trial court's judgment as to the credibility of the witnesses and their testimony. CR 52.01.

Citing case law from other jurisdictions, McCoy argues a change in ownership should negate Bailey's prior permission and begin a new period of hostile use. However, this is not the law in Kentucky. Our Supreme Court has recently and explicitly held a grant of permission by a predecessor-in-title would be sufficient to defeat a claim for a prescriptive easement. *Melton v. Cross*, 580 S.W.3d 510, 517 (Ky. 2019). Based on these principles, we conclude the trial court did not err in denying McCoy's claim of a prescriptive easement.

For his third argument, McCoy contends the trial court erroneously denied his claim of a quasi-easement allowing his passage across the Price bottom. Quasi-easement is based on a theory that an owner of two portions of land "intended to create an easement in favor of one section of his realty." *Cole*, 59 S.W.3d at 476.

> A quasi-easement is 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."

Id. (quoting *Kreamer v. Harmon*, 336 S.W.2d 561, 563 (Ky. 1960)). "Quasi-easement involves implying by operation of law the use of property based on a determination of the intent of the parties[.]" *Id*. at 477.

> 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.

Id. (footnote and internal quotation marks omitted). Finally, "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. While all of the factors are considered, the factor involving necessity is considered the most important." *Id*. (footnotes omitted).

Here, the trial court found McCoy's desire to use the Price bottom in quasi-easement would not be reasonably necessary. Not only did the trial court hear testimony and receive video evidence as to the condition of Skillet Branch, but it also inspected the property and found Skillet Branch traversable from

beginning to end. After so doing, the trial court found McCoy's preferred path across the Price bottom may be "more convenient," but did not rise to the level of being "highly convenient and beneficial to the land conveyed." *Jones v. Sparks*, 297 S.W.3d 73, 77 (Ky. App. 2009). The trial court's finding regarding the merely convenient nature of McCoy's preferred path is not clearly erroneous. Therefore, the trial court did not err in denying McCoy's claim of a quasi-easement.

Finally, McCoy argues the trial court erroneously granted damages to the Prices in the amount of $3,450. Although Chris Snedegar testified this amount would be required to fix the damage to the property, McCoy contends there was no evidence in the record showing *who* was responsible for the damage to the Price bottom. McCoy asserts the trial court had no basis to find Elmer Hunt "was the only person working in that area with equipment capable of doing such damage."

McCoy's argument against the finding of damages in the judgment cannot succeed. Even if they did not see exactly what he was doing, multiple witnesses testified how Hunt was doing work with heavy machinery in Skillet Branch. Hunt admitted he did work in Skillet Branch on McCoy's behalf. Hunt admitted he had taken a bulldozer across the Price bottom, but he attempted to lessen the effect of this admission by claiming he had only "skimmed the grass" with the blade. The record shows the trial court, acting as the factfinder, made a reasonable inference as to the cause of the Prices' damages from the testimony

presented. "[A]s long as an inference is grounded in common sense and experience, in reason and logic, and in the evidence at trial, it should be allowed and, indeed, embraced." *Southworth v. Commonwealth*, 435 S.W.3d 32, 46 (Ky. 2014). "The trial court's findings rested on inferred facts from the record, which have the same dignity as evidentiary facts. Unless clearly erroneous, we cannot disturb them on appeal." *Dingus v. FADA Serv. Co., Inc.*, 856 S.W.2d 45, 49 (Ky. App. 1993) (citing CR 52.01).

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

ALL CONCUR.

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