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Supreme Court of Kentucky

2018-SC-000336-DG

STEVE MELTON; DEBORAH MELTON; AND JUNIOR MELTON — APPELLANTS

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2016-CA-001819
CLINTON CIRCUIT COURT NO. 14-CI-00121

DONNIE S. CROSS; BETTY CAROL CROSS; KIMBERLY CROSS FERRILL; JASON FERRILL; AND DONNA BETH CROSS — APPELLEES

OPINION OF THE COURT BY CHIEF JUSTICE MINTON

AFFIRMING

We accepted discretionary review of this case, which involves a jury trial to resolve a dispute between two adjoining landowners over whether one owner's use of a road across the land of the other had ripened into a prescriptive easement. Affirming the Court of Appeals' opinion reversing the jury verdict and resulting judgment, we hold that when confronted with conflicting evidence on the issue of permissive versus prescriptive use of this road, the trial court erred by failing to instruct the jury in a way that allowed the jury to address this factual dispute to resolve it. We also take this opportunity, as a matter of first impression, to clarify Kentucky Rule of Evidence ("KRE") 801A(c)(2), the predecessors-in-interest admission-by-privity exception to the hearsay rule.

I. BACKGROUND.

The Meltons and the Crosses own adjoining farms. The Crosses' property is allegedly landlocked—surrounded by the lands of others and lacking a documented route of ingress and egress from either of the two nearby public roadways. Before 2014, the Crosses accessed one of the public roads by using a private road across the Meltons' land. But in that year, a dispute arose between them, and the Meltons blocked the Crosses' use of the road by placing a locked gate across it.

The Crosses sued in circuit court claiming a vested right to use the road as an easement acquired by prescription.[1] They sought to establish that they and their predecessor-in-interest, Walter Cross, had used this same road continuously since 1953. Donnie Cross, Walter's son and the current owner of the Crosses' land, acquired the property in 1998. Donnie and his children testified that they traveled the road during their childhoods and that the previous owners of the Meltons' property knew of their use and did not stop them from doing so. The Crosses asserted that from the 1950s through 2013 they had undisturbed access to their farm via the road, they never asked permission to use it, and no one gave them permission to use it.

The Meltons, who acquired their property in 2011, asserted that their predecessors-in-interest gave the Crosses permission to use the road.[2] A

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[1] *See Columbia Gas Transmission Corp. v. Consol of Kentucky, Inc.*, 15 S.W.3d 727, 730 (Ky. 2000) ("[A] prescriptive easement can be acquired by actual, hostile, open and notorious, exclusive, and continuous possession of the property for the statutory period of fifteen years.") (citations omitted) (emphasis added).

[2] If it is true that the Crosses had permission to use the road, then their prescriptive easement claim fails for lack of use that is hostile to the landowner. *See McCoy v.*

witness for the Meltons, Neil Thacker, testified that his grandfather, Jesse Keen, the undisputed owner of the Meltons' property between 1946 and 1998, told him that he (Keen) gave the Crosses permission to use the road. Thacker also testified that Keen told him that he (Thacker) could stop the Crosses from using the road at any time.[3] This proffered testimony by Thacker, repeating an out-of-court statement by Keen, is one of the issues before us.

At the close of all the evidence, the Crosses requested from the trial court a jury instruction based on this Court's holding in *Ward v. Stewart*, a case in which we reaffirmed a longstanding Kentucky rule that continuous, uninterrupted use of a passway without interference by the landowner over whose land it passes for a period of more than 15 years gives rise to a presumption that the use was under claim of right. The effect of this presumption is to shift the burden to the landowner to offer evidence, either direct or circumstantial, that the claimant's use was permissive.[4] The trial court here declined to give an instruction in conformance with *Ward*, settling instead for a general instruction reciting the elements necessary to prove the existence of a prescriptive easement. The propriety of the trial court's refusal to give the *Ward* instruction is the second issue before us.

Hoffman, 295 S.W.2d 560, 561 (Ky. 1956) ("It is a well settled rule that use of property by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription, for there is no presumption of a grant, and such a license or permissive right is revocable at the pleasure of the owner of the servient estate.").

[3] Thacker also testified that his grandfather required another adjoining landowner to purchase an easement to use the road.

[4] 435 S.W.2d 73, 74–75 (Ky. 1968) (citing *Cox v. Blaydes*, 54 S.W.2d 622 (Ky. 1932); *Blue v. Haner*, 395 S.W.2d 762 (Ky. 1965)).

The jury found in favor of the Meltons, which meant that the Crosses had no right to use the disputed road. And the trial court entered judgment in conformity with the jury's verdict. But the Court of Appeals reversed this judgment on appeal, finding that the trial court erred by failing to instruct the jury in conformance with the rule in *Ward*. And, realizing that the crucial issue of the admissibility of Keen's out-of-court statement would arise again on remand, the Court of Appeals also held that Thacker's testimony repeating Keen's statement about permissive use was inadmissible hearsay.

II. ANALYSIS.

A. The Court of Appeals correctly held that the trial court abused its discretion in failing to give a jury instruction based on *Ward v. Stewart*.

We address first whether the trial court committed reversible error in failing to instruct the jury based on the rule in *Ward*. We affirm the Court of Appeals' holding that the trial court committed a reversible error on this issue.

"The trial court must instruct the jury upon every theory reasonably supported by the evidence."[5] "Each party to an action is entitled to an instruction upon his theory of the case if there is evidence to sustain it."[6] "[I]n deciding whether to give a requested instruction the trial court must decide 'whether the evidence would permit a reasonable juror to make the finding the instruction authorizes.'"[7] "When the question is whether a trial court erred by .

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[5] *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015).

[6] *Farrington Motors, Inc. v. Fidelity & Cas. Co. of N.Y.*, 303 S.W.2d 319, 321 (Ky. 1957) (citations omitted).

[7] *Sargent*, 467 S.W.3d at 203 (quoting *Springfield v. Commonwealth*, 410 S.W.3d 589, 594 (Ky. 2013)) ("Therefore, in evaluating the refusal to give an instruction we must

. . not giving an instruction that was required by the evidence[,] the appropriate standard for appellate review is whether the trial court abused its discretion."[8] "[A] trial court abuses its discretion when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[9]

The law of prescriptive easements is well rooted in Kentucky. The general rule is that a plaintiff must prove the "actual, hostile, open and notorious, exclusive, and continuous possession of the [defendant's] property for the statutory period of fifteen years" to acquire a prescriptive easement over the defendant's property.[10]

But a series of presumption and burden-shifting rules also exist in our precedent. These rules were summarized in *Lambert v. Huntsman*:

> The first proposition about which there is no conflict is that the uninterrupted, continuous, and unexplained use of the passway by the claimant thereto for a period of as much as or more than 15 years will raise a presumption that the use was under a claim of right which became absolute at the expiration of the 15 years, when the claimant would become vested with the title to the passway, which the owner of the servient estate must acknowledge and respect.
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> A second equally well-settled proposition, that the presumption arising from such use is not a conclusive one, but is only a rebuttable one, under and by virtue of which the owner of the servient estate may show, in a controversy involving the right to the easement, that the use of it by the claimant was in fact permissive only, in which case the use would be but the exercise of

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ask ourselves, construing the evidence favorably to the proponent of the instruction, whether the evidence would permit a reasonable juror to make the finding the instruction authorizes.").

[8] *Id.*

[9] *Id.* (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

[10] *Columbia Gas Transmission*, 15 S.W.3d at 730.

> a license, which the owner of the servient estate might revoke at pleasure.
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> Another proposition applicable to prescriptive acquisitions of passways is that where the use at its inception is shown to have been permissive no length of time may ripen it into a right, unless in the meantime there has been a distinct and positive assertion of a claim of right to the easement, and which assertion is brought home to the owner of the servient estate.[11]

In other words, the presumption and burden-shifting rules of proving a prescriptive easement work like this: First, the plaintiff has the burden to offer proof of "uninterrupted, continuous, and unexplained use of the passway by the claimant . . . for a period of as much as or more than 15 years."[12] Doing so raises a presumption of a valid prescriptive easement on the part of the plaintiff. But this presumption is rebuttable. The defendant then has the burden to offer proof "that the use of [the passway] by the [plaintiff] was in fact permissive only."[13] If the defendant is able to offer evidence that "the use [of the passway] at its inception [was] permissive[,]" then the burden shifts back to the plaintiff to offer proof that "there has been a distinct and positive assertion of a claim of right to the easement, and which assertion is brought home to the owner of the servient estate."[14]

The trial court here refused the Crosses' request to give the burden-shifting *Ward* instruction—a jury instruction based on the first and second

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[11] 209 S.W.2d 709, 711 (Ky. 1948) (quoting *Smith v. Oliver*, 224 S.W. 683, 684 (Ky. 1920) (citations omitted)).

[12] *Id.*

[13] *Id.*

[14] *Id.*

principles discussed above. The Court of Appeals correctly held such refusal to be an abuse of discretion by the trial court because the trial court unreasonably failed to recognize that the evidence presented by the Crosses "would permit a reasonable juror to make the finding the instruction authorizes."[15]

A total of eight witnesses testified on behalf of the Crosses. Three of those witnesses, Kim Cross Ferrill, Donnie Cross, and Richard Cross provided direct testimony supporting the Crosses' "continuous, uninterrupted and without interference from the [Meltons]" use of the road over the Melton land for a period greater than the requisite 15-year statutory period. Ferrill testified that she had been using the road one to two times a week consistently for 28 years without ever getting permission from the road's owners or seeing a gate or other obstruction preventing use of it. Donnie testified to the same but added that his use had been three times weekly consistently for nearly 60 years. Richard testified to the same, adding that his use was for approximately 40 years.

A surveyor testified that he used the road for around 15 years without ever seeing a gate, fence, or any kind of obstruction preventing its use. A retired school teacher testified that she traveled on the road during her childhood without any obstruction preventing her from doing so. A neighbor testified to the same and that the gate erected by the Meltons two to three years before the lawsuit was the only barrier erected to impede use of the road.

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[15] *Sargent*, 467 S.W.3d at 203 (citation omitted).

A hunter testified that he and others used the road for close to 30 years continuously without any impediment. A woodcutter testified to the same.

The Meltons then presented evidence purporting to rebut the Crosses' prescriptive-easement claim. Some evidence suggested that the Meltons' predecessors-in-interest gave permission to the Crosses and to other neighboring landowners to use the road. Other evidence suggested that gates were in place on it long before the Crosses alleged the first gate was put in place. Further evidence from the Meltons suggested that the Crosses made no declaration of right regarding the prescriptive easement at a public auction of the Meltons' property.

Simply put, the trial court abused its discretion by failing to provide an important burden-shifting *Ward* instruction, the justification for which was amply supported by evidence offered by the Crosses that they used the road continuously, uninterrupted, and without interference by the Meltons for more than 15 years. Regardless of the amount of deference we must accord the trial court's decision because of its "complete familiarity with the factual and evidentiary subtleties of the case [and] the trial judge's superior view of that evidence,"[16] the trial court's failure to instruct the jury based on *Ward* unfairly discounts the evidence the Crosses presented to support their side of the case. Although the Meltons presented evidence refuting the Crosses' assertion of the *Ward* rule, the ultimate decision on the merits of this controversy was for the jury, not the trial court, to make. Based on all the evidence presented by the

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[16] *Id.*

Crosses, the trial court's apparent belief that "the evidence would [not] permit a reasonable juror to make the finding the instruction authorizes"[17] was unreasonable.

We cannot say that this error was harmless.[18] "[A] party claiming [harmless error] for an erroneous failure to give a necessary jury instruction[] bears a steep burden because we have held that '[i]n this jurisdiction it is a rule of longstanding and frequent repetition that erroneous instructions to the jury are presumed to be prejudicial; that an appellee claiming harmless error bears the burden of showing affirmatively that no prejudice resulted from the error.'"[19] Here, although the Meltons offered evidence to support their assertion that the Crosses do not have a prescriptive easement, we cannot presume to know how a properly instructed jury would have decided the issue. The jury heard evidence supporting two opposing theories of the case and resolving this conflict through the evidence is why we empanel juries. We affirm the Court of Appeals' decision to reverse the judgment on this issue and remand this case to the trial court for further proceedings.

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[17] *Id.*

[18] *See* Kentucky Rule of Civil Procedure ("CR") 61.01 ("[N]o error or defect in any ruling or order or in anything done or omitted by the court . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

[19] *Harp v. Commonwealth*, 266 S.W.3d 813, 818 (Ky. 2008) (quoting *McKinney v. Heisel*, 947 S.W.2d 32, 35 (Ky. 1997)); *see also Osborne v. Keeney*, 399 S.W.3d 1, 12–13 (Ky. 2012).

To conform to the burden-shifting rule in *Ward*, the trial court could include in its in instructions, along with its general instruction on adverse possession, an instruction like the following:

> You will find for the Crosses if you are satisfied from the evidence that they and their predecessors-in-title (in total) used the passway continuously, without explanation, and without interruption for 15 years or more; otherwise you will find for the Meltons. However, even though the Crosses and their predecessors-in-interest (in total) may have used the passway continuously, without explanation, and without interruption for 15 years or more, if you further believe that the Crosses or their predecessors-in-title did so with permission from the Meltons or the Meltons' predecessors-in-title, then you will find for the Meltons.[20]

As a final matter, we must address a point made by the Meltons and the dissenting judge on the Court of Appeals panel below. The dissenting judge and the Meltons argue that evidence at trial supported the fact that the Crosses' predecessors-in-interest only began using the passway after Keen gave them permission to do so; therefore, they argue, the burden-shifting rule of *Ward* does not apply, and the Crosses are not entitled to such an instruction.

The dissenting Court of Appeals judge and the Meltons essentially argue that because some evidence supported one theory of law, an instruction on a competing theory of law supported by other evidence is unwarranted. But the admission of evidence supporting one theory does not eliminate the trial court's

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[20] For further guidance on the appropriate *Ward* instruction, *see* Osso W. Stanley, *Instructions to Juries in Kentucky*, § 341(3) (2d ed. 1957) (citing *Cooper v. Washington*, 157 S.W. 1, 2 (Ky. 1913)); *see also* John S. Palmore and Donald P. Cetrulo, *Kentucky Instructions to Juries*, Civil § 47.14 Permissive Occupancy (5th ed. 2006); Stanley, *supra*, § 63. Palmore and Cetrulo's work include an additional instruction in § 47.14 incorporating the third presumption and burden shifting rule that we have not included in our proposed instruction. Whether the Crosses are entitled to an instruction on that third presumption and burden-shifting rule is an issue that can be taken up on remand.

duty to instruct the jury on a competing theory supported by different evidence. Put differently, the failure of the trial court to give an instruction to which one party is entitled is not remedied by the failure of the trial court to give a competing instruction to which the other party is arguably entitled. Rather, the appropriate action to take when competing theories are supported by the evidence is to instruct the jury on all theories supported by the evidence: "The trial court must instruct the jury upon every theory reasonably supported by the evidence."[21]

In this case, the trial court failed to give a burden-shifting *Ward* instruction. It could also be argued that the trial court failed to offer an instruction to guide the jury through the *entirety* of the presumption and burden-shifting rules from *Huntsman* and *Oliver*.[22] But the failure to instruct the jury on the totality of the presumption and burden-shifting rules does not cure the failure to instruct the jury on the *Ward* rule. The "cure," so to speak, would be for the trial court to instruct the jury on the totality of the *Huntsman* and *Oliver* presumption and burden-shifting rules to lead the jury through the process of determining whether it finds the evidence to support the application of all, some, or none of those rules. We cannot accept the dissenting Court of Appeals judge's and the Meltons' argument on this point.

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[21] *Sargent*, 467 S.W.3d at 203.

[22] The jury instruction outlining the entirety of Kentucky's longstanding presumption and burden shifting rules is outlined in Palmore and Cetrulo, *supra* note 20.

B. KRE 801A(c)(2) does not apply to except Thacker's testimony regarding Keen's statements from exclusion under the hearsay rule.

Because the Court of Appeals addressed the applicability of KRE 801A(c)(2) to Thacker's testimony regarding Keen's statements, we shall address this issue as briefed to us by the parties. We agree with the Court of Appeals that Thacker's testimony that his grandfather, Keen, told Thacker that he (Keen) gave the Crosses permission to use the road and that Thacker could stop the Crosses from using it at any time is not admissible under KRE 801A(c)(2). But we also conclude that the Court of Appeals went too far when it held that testimony flatly inadmissible. Other hearsay exceptions or exclusions may apply. But alternative theories of admissibility were not presented to us. Precisely stated, only the application of KRE 801A(c)(2) to Thacker's testimony repeating Keen's alleged out-of-court statements is before us today, so we only address this rule as presented to us by the parties. For our purposes in interpreting KRE 801A(c)(2), the Meltons do not dispute that Keen's statements constitute hearsay.[23]

KRE 801A(c)(2), entitled the admission-by-privity, predecessors-in-interest hearsay exception, states:

> Even though the declarant is available as a witness, when a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is not excluded by the hearsay rule when offered against the party if the evidence would

[23] KRE 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at [a] trial or hearing, offered in evidence to prove the truth of the matter asserted.").

> be admissible if offered against the declarant in an action involving that right, title, or interest.

The Meltons' use of KRE 801A(c)(2) to admit Thacker's testimony regarding Keen's statement is erroneous because KRE 801A(c)(2) allows admission of a hearsay statement by a predecessor-in-interest only where that statement is offered against the party in privity with that predecessor-in-title.

Keen is the Meltons' predecessor-in-interest. The Meltons are seeking to use Keen's statement to *support* their ability to block the Crosses' claim of easement by prescription. But the rule only allows statements by a predecessor in interest to be used *against* that predecessor-in-interest's successor. Such an interpretation is buttressed by the use of this hearsay exception in cases decided before the formal adoption of the Kentucky Rules of Evidence: "In pre-Rules cases, there was recognition of such an exception in a variety of situations, e.g., statements by transferor of land used against transferee, statements by property seller used against buyer, statements by property donor used against donee, and others."[24] So the Meltons' use of Keen's out-of-court statement to support their position is erroneous.

As rationale for their belief that Keen's statement is admissible against the Crosses under KRE 801A(c)(2), the Meltons highlight the Court of Appeals dissenter's rationale for admitting Keen's statement into evidence: "[T]he statement is being offered against [the Crosses] to show that the use was by

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[24] Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 8.35[2][c] (5th ed. 2013) (citing *Smith v. Justice*, 256 S.W.2d 7 (Ky. 1953); *Carrell v. Early*, 7 Ky. 270 (Ky. 1815); *Dixon v. Labry*, 29 S.W. 21 (Ky. 1895); *Fuqua's Adm'r v. Bogard*, 62 S.W. 480 (Ky. 1901) (pledgor statements used against pledgee); *Scott v. Hall*, 45 Ky. 285 (Ky. 1845) (statements by assignor of negotiable instrument admissible against assignee)).

way of permissive license when [Keen] owned the property." But this rationale misses the point of the admission-by-privity hearsay exception:

> So far as one person is privy in obligation with another, i.e., is liable to be affected in his obligation under substantive law by the acts of the other, there is equal reason for receiving against him such admissions of the other as furnish evidence of the act which charges them equally. Not only as a matter of principle does this seem to follow, since the greater here may be said to include the less; but also as a matter of fairness, since the person who is chargeable in his obligations by the acts of another can hardly object to the use of such evidence as the other may furnish. Moreover, as a matter of probative value, the admissions of a person having virtually the same interests involved and the motive and means for obtaining knowledge will in general be likely to be equally worthy of consideration.[25]

In other words, by their connection, the successor-in-interest essentially steps into the shoes of the predecessor-in-interest for purposes of the predecessor's statements. So "[i]n its most important application, the admissions-by-privies doctrine rendered admissible the statements of a person when offered against his successor in interest[.]"[26]

Here, the Crosses and Keen are not connected by privity. Keen's statements cannot be used against the Crosses because Keen's statements cannot be attributable to them.

The Meltons and the dissenting Court of Appeals judge additionally argue that Keen's statement could be argued to be against the Meltons' interest. They argue that Keen's having permitted the Crosses to use the road could be used

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[25] Lawson, *supra* note 24 at § 8.35[1] (quoting 4 Wigmore, *Evidence in Trials at Common Law* § 1077 (Chadbourn rev. 1972)).

[26] Lawson, *supra note* 24 at § 8.35[2][a] (quoting 4 Mueller & Kirkpatrick, *Federal Evidence*, 526–527 (3d ed. 2007)).

against the Meltons if the Meltons asserted a claim of trespass against the Crosses—the Crosses could claim a license to use the land, thus defeating a trespass claim.[27]

But in applying KRE 801A(c)(2), when determining whether a statement is being "offered against" the successor in interest, we look to the purpose of the party offering the statement. Here, the Meltons offered Keen's statement to support their claim that their predecessor-in-interest gave permission to the Crosses to use the road to defeat the Crosses' prescriptive-easement claim. In other words, the Meltons' purpose in introducing into evidence Keen's out-of-court statement was to support the Meltons' position that the Crosses were given permission to use the road. The Meltons, the party bound by the statement as the successors-in-interest to the declarant-predecessor-in-interest, were offering the statement in support of, not against, their case.

Finally, the Meltons cite to *Williams v. Waddle*[28] to support their interpretation of KRE 801A(c)(2), that the rule allows a predecessor-in-interest's statement to come in as evidence against a non-successor party. But we believe *Williams* is only partly useful in interpreting that rule.

In *Williams*, this Court was asked to determine the admissibility of a statement made by a party's predecessor-in-interest concerning the boundaries of the predecessor's land. In so doing, we stated the following:

> While it is generally held that the declaration of a deceased person made by him while he was the owner and in possession of land

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[27] *See, e.g., Gibbs v. Anderson*, 156 S.W.2d 876, 877 (Ky. 1941); *Holbrook v. Taylor*, 532 S.W.2d 763, 766 (Ky. 1976).

[28] 148 S.W.2d 298 (Ky. 1941).

> and while in the act of pointing out his boundaries and their marks are competent to establish, not only the extent of his possession, but that the boundaries and marks are as stated, nevertheless such declarations are not competent where the declarant had ceased to own or occupy the land at the time of the declaration.[29]

As the dissenting judge on the Court of Appeals panel noted, the Rules of Evidence Commentary to KRS 801A(c)(2) cites to *Williams* as an example of a pre-Rules application of the predecessor-in-interest exception:

> Subsection [(c)(2)] declares admissible against a party statements made by a transferor or assignor of a property interest to the party, but only if the statements were made during the declarant's ownership of the interest transferred. No change in pre-existing law results from this provision. [*See e.g., Williams v. Waddle,* 285 Ky. 416, 148 S.W.2d 298 (1941)].

But we think the drafter's citation to *Williams* was meant to illustrate the fact that the predecessor-in-interest exception applies only *if the statements were made during the declarant's ownership of the interest transferred*, and not that the rule should be construed always to allow as evidence statements made by a predecessor-in-interest concerning his boundaries regardless of whom the statements are being used against. This is evidenced both by the fact that the holding of *Williams* was that the predecessor's statements were not admissible evidence because they were made after he had ceased to own or occupy the land as well as the fact that the general rule summarized in *Williams* suggests that the exception is not party-specific, which is clearly at odds with the text of the Rule.[30]

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[29] *Id.* at 300–01.

[30] *See* KRE 801A(c)(2) (stating that the statement "is not excluded by the rule *when offered against the party . . .* ") (emphasis added). In addition, despite the Commentary drafter's citation to it, we suspect the general rule referenced in *Williams* was not the

We hold, as the text of the Rule suggests, the exception contained in KRE 801A(c)(2) applies only when the predecessor's statement is offered against his or her successor-in-interest. Because Keen's statements were not so offered in this case, they are not admissible under KRE 801A(c)(2).[31]

III. CONCLUSION.

We affirm the Court of Appeals' decision to reverse and remand this case to the trial court. On remand, KRE 801A(c)(2) is not available as a hearsay exception to admit Thacker's testimony regarding Keen's statements; however, this does not foreclose the parties from basing the admissibility of these statements on a different hearsay exception or exclusion. Additionally, the Crosses are entitled to a jury instruction based on the applicability of *Ward* in words like the prototype instruction we have provided above.

All sitting. All concur.

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pre-rules version of KRE 801A(c)(2), but rather was a general statement that predecessor-in-interest statements are often admissible under what is presently the statements-against-interest exception to the hearsay rule or some general exclusion to the hearsay rule, because these statements are often admitted as evidence of where the predecessor *thought* his boundary was instead of evidence of where the boundary actually was. *Williams* itself cites two different rule statements to this effect. *See* 22 C.J. 275 (stating "[w]hile the declaration of one in possession of premises as to the line of his boundary is not evidence that such is in fact the true line, it is primary evidence of the extent of his claim in that particular . . ."); *Preston v. Vanhoose*, 116 S.W. 279 (Ky. 1909) (stating that predecessor's statement concerning his boundary line would "[a]t most, . . . only be an admission in derogation of his title . . .").

[31] On remand, it may be argued that the Keen's statements are admissible under some other hearsay exception or exclusion.

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