

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

BRUCE C. RILEY AND LISA RILEY,	:	IN THE SUPERIOR COURT OF
FORMERLY KRESOVICH, HUSBAND AND:	:	PENNSYLVANIA
WIFE; AND DOE MOUNTAIN FOREST	:	
PROPERTY OWNERS ASSOCIATION	:	
	:	
	:	
v.	:	
	:	
SYLVIA A. BELDEN A/K/A BELDIN,	:	
JAMES A. McDONALD AND SANDY	:	
WALLACE,	:	No. 800 WDA 2013
	:	
Appellants	:	

Appeal from the Order, April 19, 2013,
in the Court of Common Pleas of Bedford County
Civil Division at No. 84 for the Year 2011

BEFORE: GANTMAN, P.J., FORD ELLIOTT, P.J.E., AND OLSON, J.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED JUNE 30, 2014**

Appellees, plaintiffs in the court below, brought this action seeking to enjoin the defendants/appellants from interfering with their use of an ingress/egress road traversing appellants’ property. After a non-jury trial, the trial court granted a permanent injunction and enjoined appellants from interfering with or obstructing appellees’ right to use the road. This appeal followed. After careful review, we affirm.

The matter before the Court is a civil action in which [appellees] seek to enjoin [appellants] from interfering with [appellees’] use of an ingress/egress road (hereinafter referred to as “Old Road”) across [appellants’] property and an alternate ingress road adjoining [appellants’] property. [Appellees] aver

that [appellants] have obstructed their use of the Old Road by digging trenches across it. [Appellants] do not deny the averred obstruction of the Old Road, nor their continued intention to interfere with [appellees'] use of the roads. Rather, [appellants] contend that [appellees] are not entitled to the use of the Old Road as they contend [appellees'] purported easement was the result of an invalid deed due to fraud. On May 9, 2012 we granted [appellees] a preliminary injunction that enjoined [appellants] from interfering with [appellees'] use of the road. On January 2 and 3, 2013 we held a non-jury trial in the matter[.]

Trial court opinion, 3/19/13 at 1.

In its opinion and order filed March 19, 2013, the trial court found that the deed was valid; that the easement in favor of appellees was not abandoned or terminated; that the location of the easement was the Old Road running across appellant McDonald's property, and not a private access road running adjacent to the property, as contended by appellants; and that the boundary line between Lot 24 of the Doe Mountain Forest subdivision and appellants' property is 802.25 feet, not 882.25 feet as shown in the original subdivision plan. The trial court issued an order permanently enjoining appellants from interfering with or in any way obstructing appellees' right to use the road known as the Old Road, which traverses appellants' land from Milligans Cove Road in Harrison Township, Bedford County, into appellees' properties within the Doe Mountain Forest subdivision; and permanently enjoining appellants from interfering with or obstructing appellees' right to open and use a private access road on Lots 24

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and 1 of the Doe Mountain Forest subdivision adjoining appellants' property as shown on the corrected plan of record for the subdivision. The trial court also retained jurisdiction in the matter in order to ensure compliance.

On March 28, 2013, appellants filed post-trial motions which were denied, following a hearing, on April 19, 2013. Appellants filed notice of appeal on May 8, 2013. Appellants complied with Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A., and the trial court filed a Rule 1925(a) opinion, relying on its prior opinion and order filed March 19, 2013.

Appellants have raised the following issues for this court's review:

1. Was the evidence provided by the appellants sufficient to void the deed alleged to convey the appellees' real estate to their predecessors in title?
2. Was the evidence provided by the appellants sufficient to prove relinquishment and abandonment of the right-of-way as stated in previous deeds by appellees' predecessor in title, Penn Wilderness?
3. Was the evidence presented at trial sufficient to establish the right-of-way conveyed to appellees and their predecessors in title, to be located 200 yards north of the last building of grantors?
4. Did appellees fail to provide sufficient evidence to establish the location, metes and bounds, of the claimed right-of-way?
5. Did appellees fail to provide sufficient evidence to establish the common property line between appellants' and appellees' properties?

Appellants' brief at 4.

Our appellate role in cases arising from non-jury trial verdicts is to determine whether the findings of the trial court are supported by competent evidence and whether the trial court committed error in any application of the law. The findings of the trial judge in a non-jury case must be given the same weight and effect on appeal as the verdict of a jury, and the findings will not be disturbed on appeal unless predicated upon errors of law or unsupported by competent evidence in the record. Furthermore, our standard of review demands that we consider the evidence in a light most favorable to the verdict winner.

Baney v. Eoute, 784 A.2d 132, 135 (Pa.Super. 2001) (citation omitted).

Additionally, “the trial court, as factfinder, is free to believe all, part or none of the evidence presented” ***Turney Media Fuel, Inc. v. Toll Bros., Inc.***, 725 A.2d 836, 841 (Pa.Super.1999). “[T]herefore, assessments of credibility and conflicts in evidence are for the trial court to resolve; this Court is not permitted to reexamine the weight and credibility determinations or substitute our judgment for that of the factfinder.” ***Id.***

Sovereign Bank v. Valentino, 914 A.2d 415, 420 (Pa.Super. 2006).

Simply stated, the trial court, as fact-finder, did not find appellants’ primary witness, James McDonald, to be credible. (Trial court opinion, 3/19/13 at 4.) The trial court did not believe his testimony that his grandmother, Daisy Mowry, could not have signed the deed because she was in California at that time. (***Id.***) According to McDonald, he was a police officer in Los Angeles in August 1965, during the Watts riots, and visited his grandmother approximately three times a week during that time. (***Id.***) McDonald testified that Mowry never left her house in California during the

riots and could not possibly have executed the deed in Pennsylvania on August 24, 1965. (*Id.*) However, the trial court noted that the riots ended on or about August 15, 1965, nine days before the deed was signed. (*Id.*) In addition, McDonald's trial testimony was inconsistent with his deposition testimony and his answers to interrogatories. (*Id.*) Ultimately, the trial court did not credit McDonald's trial testimony concerning his grandmother's whereabouts on August 24, 1965. (*Id.* at 5.) The trial court's assessment of McDonald's credibility is supported by the record, and we are bound by it on appeal.

The trial court also rejected McDonald's testimony that the right-of-way was properly located on a private access road running adjacent to his property. The trial court found that the location of the easement granted by the Mowrys was the road identified by the parties as the Old Road. (*Id.* at 7.) McDonald testified that the Old Road was hardly passable. However, the trial court found the testimony of appellees' witness, Roland Beals, to be more credible in this regard. (*Id.* at 6-7.) Beals, who had no interest in this case, testified that he cut timber on the property from 1965 to 1969. (*Id.* at 7.) Beals testified that the Old Road was the only access to the property and was in good shape. (*Id.*) Again, we are bound by the trial court's credibility determinations.

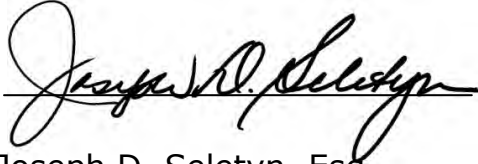
We find that the trial court's March 19, 2013 opinion ably and comprehensively disposes of all issues raised on appeal, and we affirm on

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the basis of that opinion. The trial court's findings are amply supported by the record, and its conclusions are without legal error.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line underneath the name.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/30/2014

Adly Diehl

**IN THE COURT OF COMMON PLEAS
OF BEDFORD COUNTY, PENNSYLVANIA**

BRUCE C. RILEY AND LISA RILEY, ET AL.,	:	
PLAINTIFFS	:	
	:	NO: 84 FOR 2011
v.	:	
	:	CIVIL DIVISION
SYLVIA A. BELDEN, JAMES A.	:	
MCDONALD, ET AL.,	:	
DEFENDANTS	:	
	:	
	:	
	:	

TRIAL OPINION

I. SUMMARY OF FACTS

The matter before the Court is a civil action in which Plaintiffs seek to enjoin Defendants from interfering with Plaintiffs use of an ingress/egress road (hereinafter referred to as "Old Road") across Defendants' property and an alternate ingress road adjoining Defendants' property. Plaintiffs aver that Defendants have obstructed their use of the Old Road by digging trenches across it. Defendants do not deny the averred obstruction of the Old Road, nor their continued intention to interfere with Plaintiffs use of the roads. Rather, Defendants contend that Plaintiffs are not entitled to the use of the Old Road as they contend Defendant's purported easement was the result of an invalid deed due to fraud. On May 9, 2012 we granted Plaintiffs a preliminary injunction that enjoined Defendants from interfering with Plaintiffs' use of the road. On January 2 and 3, 2013 we held a non-jury trial in the matter; this Opinion and Order follow.

II. ISSUES

There exist one primary issue and two secondary issues in the matter. The primary issue in the case is whether the deed recorded at Deed Book 279, Page 550 was validly executed by Daisy V. Mowry. Provided said conveyance is valid, the secondary issues deal with the location of the easement created by said conveyance and also the measurement of an adjoining property boundary line. We will discuss these issues in turn.

II(A). VALIDITY OF CONVEYANCE BY DAISY V. MOWRY

By deed dated August 24, 1965, and recorded in Deed Book 279, Page 550, Daisy V. Mowry and J. Russell Mowry reserved an easement for the purposes of accessing what is now the Doe Mountain Forest Subdivision.¹ There is no dispute that, if validly executed, said deed effectively created an easement for Plaintiffs' predecessors and Plaintiffs to access the Doe Mountain Forest property.² The issue, then, turns to whether the conveyance dated August 24, 1965 was duly executed.

In their *Answer*, Defendants aver that the predecessor conveyance by the Mowrys is an invalid conveyance on two counts: 1) J. Russell Mowry's signature was not notarized³ and, 2) Daisy V. Mowry's signature is fraudulent in that she was absent from Pennsylvania when the deed was signed.

¹ Said conveyance contains the following language: "The grantee, its successors and assigns, shall have a right of way over the remaining lands of the grantor, now used by the Pennsylvania Game Commission."

² Although Defendants do contest the actual *location* of the easement, which we discuss, *infra*.

³ We do understand that Plaintiffs presented evidence at trial and now argue that J. Russell Mowry's signature was acknowledged but that it simply was hidden when it was recorded. Given our rulings in the matter we need not address this, as we find Defendants fail to meet their burden even assuming his signature was not acknowledged.

As we indicated in our pre-trial Memorandum, we find Defendants' first averment unpersuasive. The effect of notarization and attachment of seal is well settled and, in our opinion, not dispositive of the issue. An acknowledgement is a judicial act and is conclusive of the facts certified in the absence of fraud. *Carr v. H.C. Frick Coke Co.*, 32 A. 656, 662 (Pa. 1895). However, an acknowledgement is unnecessary to render a deed valid as between the parties. *Faust v. Heckler*, 58 A.2d 147, 149 (Pa. 1948). "All deeds or instruments in writing for conveying or releasing lands made by any natural person...but with no seal affixed thereto, shall be deemed to be executed with the same force and effect in all respects as though a seal was affixed to the signature." 21 P.S. §10. Therefore, the fact that J. Russell Mowry's signature was not notarized is of no consequence, absent some showing of fraudulent conduct.⁴

Defendants argument regarding Daisy V. Mowry's signature requires more discussion. Specifically, Defendants claim that Daisy V. Mowry was never present when the deed was executed and that, therefore, the instrument was fraudulent and invalid. It is important to note that, unlike J. Russell Mowry's signature, Daisy V. Mowry's signature was acknowledged. It is well settled law that, "[a] notary public's certificate is prima facie evidence of the due execution of a written instrument, but it is not conclusive in a case of fraud or forgery. It does not prevent the showing that in truth the one alleged to have made the acknowledgment never appeared before the notary." *Williamson v. Barrett*, 24 A.2d 546, 548 (Pa.Super. 1942). "It [the acknowledgment] may be rebutted, but *clear and satisfactory proof is required.*" *Id.* (emphasis added).

⁴ And, as we will discuss immediately below, we find that Defendants have failed to provide any credible evidence of fraud.

Therefore, Daisy V. Mowry's signature has prima facie standing as duly executed unless and until Defendants show fraud by clear and satisfactory proof.

At trial, Defendants attempted to show such fraud through the testimony of James McDonald.⁵ Defendant McDonald is the grandson of Daisy V. Mowry. He testified that Daisy V. Mowry relocated to Glendale, California sometime before 1964 and that he was stationed in Los Angeles, California as a police officer in August of 1965. Defendant McDonald testified that he was sure of the above timeframe due to the infamous Watts Riots in Los Angeles which began August 11, 1965, and his involvement with the riots. He further testified that his grandmother never left her residence in California from the beginning of the riots until the end August due to her concern of the riots. Defendant McDonald testified that he knew this because he visited her approximately three times a week, especially during the riots.

Based upon our observation of Defendant James McDonald, his testimony, and the other evidence in the case, we do not find his testimony to be credible. First, Defendant McDonald admitted in cross examination that his deposition testimony and interrogatory answers on how often he saw his grandmother in August of 1965 differed from what he testified to at trial. Second, he conceded that the Watts Riots had concluded around August 15, 1965, which was approximately nine days before the deed at issue was executed. Third, Defendant McDonald also admitted that the Watts Riots occurred eighteen miles from where his grandmother lived. Given these substantial constraints that severely limit the substantive weight of Defendant McDonald's testimony, coupled with inevitable erosion of memory over four decades, we cannot

⁵ We note that Defendant James McDonald was the only named Defendant to attend the trial. The other Defendants were notified of the trial and chose not to appear.

place any substantive merit on his testimony regarding his grandmother's whereabouts on August 24, 1965. We therefore find that there is no credible evidence to invalidate J. Russell Mowry's purported signature, and that there is no credible evidence to rebut the prima facie validity of Daisy V. Mowry's signature. Accordingly, we find that the deed dated August 24, 1965 and recorded in Deed Book 279, Page 550 and reserving an easement for Plaintiffs and Plaintiffs' successors, was duly executed and a valid instrument.

II(B). TERMINATION OF EASEMENT

Defendants next argue that, despite the clear reservation of the easement by J. Russell Mowry and Daisy V. Mowry, the easement in favor of Plaintiffs was nonetheless terminated due to subsequent conveyances. Defendants rely upon the fact that subsequent conveyances do not all expressly convey the same easement as the deed from the Mowrys. We find that this argument has no merit.

"In order for the servient tenement to establish abandonment 'Pennsylvania law requires that there be a showing of intent of the owner of the dominant tenement to abandon the easement, coupled with either (1) adverse possession by the owner of the servient tenement; or (2) affirmative acts by the owner of the easement that renders the use of the easement impossible; or (3) obstruction of the easement by the owner of the easement in a manner that is inconsistent with its further enjoyment.'" *Piper v. Mowrls*, 351 A.2d 635, 640 (Pa. 1976). There is no such showing in this case of abandonment or termination of easement. Moreover, while the subsequent deeds may not expressly mention the easement in the Old Road, they do contain the language that all of the "...rights, liberties, privileges, hereditaments and appurtenances...and all the Estate,

Right, Title, Interest, Property, Claim and Demand..." of the Grantor was conveyed. See Plaintiffs' Exhibit A, Deed Book 449, Page 106. We therefore reject the argument that the subsequent conveyances terminated or otherwise extinguished Plaintiffs' interest and rights in the easement. See *Id.*⁶

II(C). LOCATION OF EASEMENT

Having found that a valid easement was reserved by the Mowrys and having concluded that said easement was never terminated nor abandoned, the issue then turns to the location of the easement described by the Mowrys as "...a right of way over the remaining lands of the grantor, now used by the Pennsylvania Game Commission." See Plaintiffs' Exhibit H. Plaintiffs argue that the roadway designated as the Old Road which runs across Defendant McDonald's property is the proper location of the easement. Defendants counter that the easement is properly located on a private access road running adjacent to Defendant McDonald's property.

In support of Defendants position, Defendant McDonald testified that the road the Game Commission used to access the Game Lands property was nearer to the adjacent private access road. He further testified that he was at his property at least once a year since 1961 and, that in 2001, one would have to drive through a creek to go through the Old Road. Defendant McDonald also provided other details in support of his assertion that the private access road was intended as a use of access to the Game

⁶ Similarly to this case, the *Piper* Court explained that, "[t]he deed also provided that the grantee would take the grantor's land 'together with all and singular the rights, liberties, privileges, hereditaments and appurtenances whatsoever thereto belonging. . . .' Moreover, as the court below held, the words of the Carr-Kiser deed must be construed in favor of the grantee Kiser, and in favor of the easement." *Piper v. Mowrls*, 351 A.2d 635, 639 (Pa. 1976). We hold that such an analysis controls this case as well.

Lands area and that the Old Road was hardly passable. Plaintiffs called Roland Beals, who cut timber around the Game Lands property from 1965 to 1969. Mr. Beals testified that the only access to the Game Lands property was the Old Road, except for an access road on the other side of the property.⁷ He testified that, contrary to Defendant McDonald's memory, the Old Road was in good shape with tandem trucks hauling timber across it. Based upon our observations of the two witnesses and how their testimony fits with the other evidence in the case, we find Mr. Beal's testimony as more credible. By accepting Mr. Beal's testimony regarding the condition of the Old Road and the exclusive use of the Old Road to access the Game Lands area, we find that the location of the easement granted by J. Russell Mowry and Daisy V. Mowry to be the road identified by the parties as the Old Road.⁸

II(D). LENGTH OF BOUNDARY WITH LOT 24

The last matter at issue is the length of the western boundary of Defendants' property. Matthew Laidacker, a professional land surveyor, testified that he learned of a problem with a boundary line of Lot 24 of the Doe Mountain Forest subdivision adjacent to Defendants' property. This problem arose due to Plaintiffs' attempts to create a secondary private access road to the Doe Mountain Forest Subdivision. Mr. Laidacker conducted an analysis of Lot 24 and testified that, in his opinion, the boundary line between Lot 24 and Defendants' property should be 802.25 feet and not the 882.25 feet shown in the original subdivision plan. Mr. Laidacker prepared an updated subdivision

⁷ It should be noted that Mr. Beals was clear in his testimony that he did *not* mean the private access road that Defendant McDonald claims is the location of the easement.

⁸ To be more precise, the easement is located as the road identified as "Game Lands Road" on Plaintiffs' Exhibit F, which is a subdivision plan of Doe Mountain Forest recorded at Plat Book 7, Page 510.

plan which was recorded at Plat Book 7, Page 510. See Plaintiffs' Exhibit F.

Additionally, Allen Diehl and Rick Whetstone, professional land surveyors, testified that the boundary line between Lot 24 and Defendants' property should be 802.25 feet.⁹

Defendants did *not* produce a professional land surveyor who testified that the boundary was correctly put at 882.25 feet as in the original subdivision plan. Given the uncontradicted testimony of at least two professional land surveyors that the place the correct distance of the boundary at 802.25, we see no reason not to adopt their findings. Accordingly, we find that the boundary line between Lot 24 of the Doe Mountain Forest and Defendants' property to be 802.25 feet, as is shown in Plaintiffs' Exhibit F.

We therefore enter the following

III. ORDER OF COURT

AND NOW, this 18th day of March, 2013, after hearing, the Order of Court is as follows:

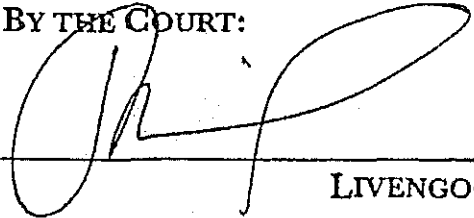
1. Defendants are permanently enjoined from interfering with or obstructing in any way and by any means Plaintiffs' right to use the road known as the Old Road, Game Lands Road, and/or Turkey Ridge Road, which traverses Defendants' land from Milligans Cove Road in Harrison Township, Bedford County, Pennsylvania, into Plaintiffs' properties within the Doe Mountain Forest subdivision.
2. Defendants are permanently enjoined from interfering with or obstructing in any way and by any means Plaintiffs' right to open and use a private access road on Lots 24

⁹ Specifically, Mr. Whetstone testified that he put the boundary line at 805.38 feet but testified that such a small deviation from the surveys of Mr. Whetstone and Mr. Laldacker could simply be from where a pin is placed in the Township Road south of the property. In any event, we find a difference of approximately three feet as negligible and inconsequential to our findings.

and 1 of the Doe Mountain Forest Subdivision adjoining Defendants' property as shown on the corrected plan of record for the Doe Mountain Forest Subdivision.

3. The Court retains jurisdiction in the matter to ensure compliance with this Order.
4. The bond previously ordered and posted by Plaintiffs is released.

BY THE COURT:



LIVENGOOD, J.

Counsel:

For the Plaintiffs: David J. Flower, Esquire

For the Defendants: Dwight G. Diehl, Esquire