

RENDERED: DECEMBER 8, 2017; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2014-CA-000209-MR

POCAHONTAS DEVELOPMENT CORPORATION

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT  
HONORABLE ROBERT W. MCGINNIS, JUDGE  
ACTION NO. 10-CI-00120

DANIEL B. BLANTON; PAULA BLANTON;  
ANNA B. NEAL; ALMA J. SMUKLER;  
WILLIAM SMUKLER; ANNA L. DOLAN;  
ANNE B. DOLAN; EDNA D. ARRINGTON;  
CHARLES R. ARRINGTON; CAROLYN S. MOODY;  
WILLIAM S. MOODY, JR.; ANNA E. FARMER; AND  
P.D.J. BAILEY MINING, INC.

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, DIXON, AND STUMBO, JUDGES.

DIXON, JUDGE: Appellant, Pocahontas Development Corporation, owns acreage  
in the Forester's Creek Watershed in Harlan County, and Appellees are adjoining

land owners. Appellant's primary business is leasing the mineral and timber rights on its land. This dispute concerns the rights of the parties in the use of Forrester's Creek Road, which provides access to coal mines located on their respective parcels. The road crosses five parcels: Appellant's property includes the first and fifth sections of the road; Appellees' property includes the second and fourth sections of the road; and JAD Coal Company owns property encompassing the third section of the road. JAD is engaged in the business of coal mining, and it leases the coal rights for the properties owned by Appellant and Appellees.

Appellant purchased its property from Kentenia Corporation in 1980. Kentenia's lessee, Kentucky Harlan Coal, continued its mining operations on the property until the lease was terminated by Kentucky Harlan's bankruptcy in 1997. Thereafter, JAD leased the mining rights from Appellant and subsequently constructed a new coal preparation plant on the property. The lease specifically addressed coal mined from other property:

Section 11.1. In the event Lessee transports or ships coal from any property not owned by Lessor into, over, through or under any of the leased properties, Lessee shall pay to Lessor fifteen cents (15¢) per net ton of that coal, or, one-half of one per cent (½ %) of the average gross selling price per net ton of that coal . . . as land use toll for such transportation or shipment.

Around the same time, JAD also leased the mining rights to Appellees' property in the watershed. In 2006, JAD renegotiated its lease with Appellees and executed a new twenty-year lease. The new lease included the following provision:

- (6) Lessee shall pay to the lessors wheelage for all off-lease coal transported over, across, and under the premises leased herein in the amount of Twenty Cents (\$.20) per ton.

In 2010, JAD filed a declaratory judgment action against Appellees alleging Forrester's Creek Road was a public road. Appellees filed a counter-claim asserting JAD was in breach of the lease because it had failed to pay the wheelage fee for off-lease coal hauled across Appellees' property. Thereafter, Appellant filed an intervening complaint for declaration of rights alleging the road was public or alternatively, that Appellant had a prescriptive easement to use the road across Appellees' property. The parties engaged in extensive discovery and submitted numerous affidavits to support their respective positions.

In September 2011, the court granted partial summary judgment in favor of Appellees, which established the road was a private road. The court later granted Appellees' motion for summary judgment against JAD and specifically found JAD could not prove an easement existed because its right to use the road was permissive pursuant to Appellees' lease. Appellees and JAD thereafter settled the counter-claim for wheelage fees, and the court entered a judgment awarding Appellees \$702,166.88. After judgment was entered against JAD, Appellant amended its complaint to allege an additional theory of easement by estoppel or license. The circuit court ultimately granted summary judgment in favor of Appellees, and this appeal followed.

On appellate review, we must determine “whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Norton Hospitals, Inc. v. Peyton*, 381 S.W.3d 286, 290 (Ky. 2012). “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). “The party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial.” *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001).

#### I. Prescriptive Easement

“As with adverse possession of a fee simple estate, a prescriptive easement can only be acquired by actual, hostile, open and notorious, exclusive, and continuous possession of the property for the statutory period of fifteen years.” *Poe v. Gaunce*, 371 S.W.3d 769, 774–75 (Ky. App. 2011).

Appellant first contends disputed issues of fact exist regarding whether its use of the road crossing Appellees’ property was adverse or permissive. Appellant relies on *Blue v. Haner*, 395 S.W.2d 762, 763 (Ky. 1965), which stated, “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.” Appellant contends it submitted sufficient evidence of continuous use of the road; accordingly, Appellant believes Appellees bore the burden of rebutting the presumption of adverse use.

Appellant’s argument overlooks *Cole v. Gilvin*, 59 S.W.3d 468, 475-76 (Ky. App. 2001), wherein this Court explained:

[I]t is well-established that if the right to use a passway at its inception is permissive, the existence of a prescriptive easement or even a presumption of a claim of right does not arise unless there has been some distinct and positive act of assertion of right made clearly known to the owner of the servient tenement.

Although affidavits introduced by Appellant indicated continuous use for many years, Appellant was not entitled to the presumption of adverse use because Appellant’s right to use the road at its inception was permissive. The evidence was undisputed that Appellees’ predecessors permitted Ephie Blanton (the owner of Kentucky Harlan) to use the road in the 1970s. In his affidavit, Jimmy Blanton explained his father, Ephie, received permission from Appellees’ predecessors, Woodrow Blanton and Paul Bailey, to utilize the road crossing their property for access to the mine facilities. The recorded statement of Robert Lee and the affidavits of Mark Bailey and Dale Lusk corroborated the testimony of Jimmy Blanton.<sup>1</sup> “It is a well settled rule that use of property by express or implied

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<sup>1</sup> According to Lusk, Ephie Blanton had a “gentlemen’s agreement” with Woodrow Blanton and Paul Bailey that “coal from [Ephie’s] property could be hauled across [Blanton-Bailey] property without charge and that coal from [Blanton-Bailey] property could be hauled across [Ephie’s] property without charge.

permission or license, no matter how long continued, cannot ripen into an easement by prescription.” *Poe*, 371 S.W.3d at 775. We conclude the undisputed evidence Appellant’s predecessors used the road with permission defeated Appellant’s claim to an easement by prescription; consequently, the court properly granted summary judgment to Appellees.

## II. Easement by Estoppel or Irrevocable License

“Estoppel is an equitable principle utilized to prevent one who has failed to act when he should have acted from reaping a profit to the detriment of his adversary.” *Loid v. Kell*, 844 S.W.2d 428, 430 (Ky. App. 1992). “The requirements necessary to establish the existence of an easement by estoppel are: (1) conduct which amounts to a false representation or concealment of material facts which a party subsequently attempts to assert; (2) intention, or at least the expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of real facts.” *Jones v. Sparks*, 297 S.W.3d 73, 77 (Ky. App. 2009).

Here, Appellant points to the litigation between JAD and Appellees, wherein Appellees specifically asserted Appellant was permitted to use the road across their property, but only for conducting inspections. Appellant contends Appellees should be estopped from attempting to restrict Appellant’s access because its use

of the road had always been permissive; accordingly, Appellant believes neither party had a right to restrict the other's use of the road.<sup>2</sup>

Appellant's argument fails to address the requirements necessary to establish the existence of an easement by estoppel. Specifically, the record is devoid of any evidence Appellees made a false representation regarding Appellant's use of the road or that Appellant relied on a false statement to its detriment. Although Appellant contends Appellees acquiesced in Appellant's use of the road, we are mindful that "mere acquiescence . . . is not sufficient to create an estoppel." *Embry v. Turner*, 185 S.W.3d 209, 216 (Ky. App. 2006). Rather, the party claiming estoppel "must have been induced to act to his detriment or misled to his injury." *Id.* After careful review, we conclude Appellees were entitled to summary judgment on this issue.

Finally, we address Appellant's contention it had an irrevocable license to use the road across Appellees' property.

A license in respect to real property can be defined as a personal privilege to do acts upon the land of the licensor of a temporary nature which are revocable at the will of the licensor. However, an owner may be estopped to revoke the license when, with the knowledge of the owner, the licensee makes valuable improvements in reliance upon the continued existence of the license.

*PSP North, LLC v. Attyboys, LLC*, 391 S.W.3d 396, 398 (Ky. App. 2013) (internal citations and quotation marks omitted). In the case at bar, there was no evidence

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<sup>2</sup> The record clearly reflects, in its lease with JAD, Appellant reserved the right to prohibit JAD from transporting coal from any property not owned by Appellant across Appellant's property.

Appellant, relying on the continued existence of a license, made valuable improvements to Appellees' land that would entitle Appellant to an irrevocable license. We conclude the circuit court properly granted summary judgment to Appellees.

For the reasons stated herein, the judgment of the Harlan Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

David C. Stratton  
Pikeville, Kentucky

Stephen M. Hodges  
Wade W. Massie  
Abingdon, Virginia

BRIEF FOR APPELLEES:

Gary W. Napier  
Drayer B. Spurlock  
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