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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001819-MR

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

v.

APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE DAVID WILLIAMS, JUDGE
ACTION NO. 14-CI-00121

STEVE MELTON; DEBORAH MELTON; JUNIOR MELTON; AND ILLWILL CREEK FARMS, INC. — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JONES, KRAMER, AND MAZE, JUDGES.

MAZE, JUDGE: This appeal arises from a jury verdict denying Appellants' use of a roadway. As the record shows the jury instructions were improper, and hearsay

evidence was improperly allowed in at trial. We reverse and remand with instructions for a new trial.

Background

This case ultimately involves a question of whether the Appellants' use of a roadway is by a prescriptive easement or was permissive. The roadway is on the Melton Family's (Appellees) property and was used by the Cross Family (Appellants) for many years until a gate was put up by the Appellees blocking access. This blocked access has resulted in damages to the Appellants. The underlying issue is whether the Appellants merely had permissive use of the roadway or if the roadway has now become an easement. More facts will be developed as necessary to complete the analysis.

Standard of Review

On appellate review, when determining "whether a trial court erred by: (1) giving an instruction that was not supported by the evidence; or (2) not giving an instruction that was required by the evidence; the appropriate standard . . . is whether the trial court abused its discretion." *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015). Similarly, evidentiary rulings are reviewed under an abuse of discretion standard. *Kerr v. Commonwealth,* 400 S.W.3d 250, 261 (Ky. 2013). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). Absent a "flagrant miscarriage of

justice," the trial court will be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

Analysis

On appeal, the Appellants make several arguments, but only the first and third arguments are discussed, as those arguments are determinative. First, they contend that the trial court erred by failing to properly instruct the jury regarding the Plaintiffs' claim of right. Next, they contend that the Appellees provided no evidence to overcome the presumption. Third, the Appellants argue that the trial court erred in permitting hearsay testimony regarding the issue of permissive use. Finally, the Appellants contend that the Appellees introduced no evidence to counter the claim of an apparent easement and therefore the trial court erred by failing to grant either summary judgment or judgment notwithstanding the verdict (n.o.v.) to the Appellants.

First, Appellants contend that the trial court erred by failing to properly instruct the jury in accordance with *Ward v. Stewart*, 435 S.W.2d 73 (Ky. 1968). *Ward* states that "the rule requires the owner of the servient estate to show affirmative permission (either by direct proof or by inference) rather than merely show an absence of affirmative claim of right." *Id*. at 75. There, the court found that the evidence introduced by the servient estate "was not so strong as to overcome the presumption that the use of the passway was under a claim of right." *Id*. at 76. When the use is beyond the prescriptive period, continuous and uninterrupted,

> [u]nder the well-established rule such facts raised a presumption that the use of the passway was under a claim of right and cast the burden on the [servient estate] to show that the use was merely permissive, the presumption being of considerable strength by reason of the long period of time (beyond the minimum prescriptive period of 15 years) during which the use had extended.

Id. at 74-75. Additionally, the Kentucky Supreme Court in *Sargent* explained that "[t]he trial court must instruct the jury upon every theory reasonably supported by the evidence." *Sargent*, 467 S.W.3d at 203.

Here, the jury instructions drafted by the trial court, instructed the jury that "in order for a prescriptive easement to be established by the Plaintiffs, it must be proven that all of the necessary requirements have been fully satisfied . . ." and then listed the seven requirements of a prescriptive easement: Non-permissive, Actual, Hostile, Open and notorious, Exclusive, Continuous possession; fifteen (15) years. The jury was also instructed on the theory of apparent prescriptive easement. The trial court, however, did not incorporate the standard expressed in *Ward* which creates a presumption of a claim of right and shifts the burden to the defendants to prove permissive use. The Appellees claimed that use was permissive from the beginning and therefore a claim of right was never established. The jury, however, should have been instructed on the *Ward* standard in order to make a proper finding. We find, therefore, that the jury instructions given were improper and an abuse of discretion and reverse on that issue.

The improper jury instruction is sufficient to remand this case back to the trial court. However, we will briefly address the hearsay issue raised by the Appellants. Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." KRE[1] 801. Here, a prior owner of the property in question, Neil Thacker, testified regarding statements alleged to have been made by his grandfather who previously owned the property. Thacker testified that his grandfather had told him he granted permission for use of the roadway. A hearsay objection was made, and the trial court overruled the motion on the basis of a nonspecific hearsay exception which the court believed applied to right of way ownership and usage.

We tend to believe that the trial court was thinking of KRE 803(20) which is a hearsay exception applying to, "[r]eputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located." KRE 803(20). We note that this exception would not apply to the current situation in which a grandson is testifying to words spoken by his grandfather about their own specific land. This does not meet the requirement of "reputation in a community."[2] Additionally, the rule only concerns boundaries or

[1] Kentucky Rules of Evidence.

[2] This Court in *Wells v. Sanor*, 151 S.W.3d 819 (Ky. App. 2004), applied KRE 803(20) to a similar, yet different, situation. However, the cited discussion is relegated to a footnote, and it is not clear that the hearsay issue was properly before the Court in that case. Hence, any discussion

general history, and does not carve out an exception for hearsay statements regarding alleged permissive use. The Appellees contend that the trial court was possibly referencing KRE 801A(c)(2) which states,

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

We agree with the Appellants and find that KRE 801A(c)(2) would not apply to the current facts. The alleged statements by the grandfather were not admitted into evidence to prove ownership; the fact that the grandfather was a prior owner is not in dispute. Instead, it was admitted to prove whether he had intended that the use be permissive. See a discussion of why KRE 801A(c)(2) does not apply to the current facts in *Cadleway Properties, Inc. v. Bayview Loan Servicing, LLC*, 338 S.W.3d 280, 289 (Ky. App. 2010). We, therefore, find that the statement was inadmissible hearsay and the trial court abused its discretion in allowing it.

Our analysis concludes with a finding that the statement in question was inadmissible hearsay and that the jury instructions were improper. We reverse and remand on these issues without a discussion regarding the issues of whether the *Ward* presumption was overcome by the evidence, whether it was a trial error

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of the applicability of KRE 803(20) is merely dicta.

to allow the jury to view an alternate entrance, and whether the trial court failed to grant summary judgment or judgment n.o.v. to the Appellants on the issue of apparent easement. We do note, however, that if the only evidence of permissive use is the now declared inadmissible hearsay evidence, a directed verdict judgment may be appropriate.

Conclusion

For the reasons stated herein, we reverse and remand for a new trial in accord with this opinion.

KRAMER, JUDGE, CONCURS.

JONES, JUDGE, DISSENTS WITH SEPARATE OPINION.

JONES, JUDGE, DISSENTING: Respectfully, I dissent. I do not agree that the trial court erred in instructing the jury or in allowing Thacker to testify. Additionally, I find no merit in the Appellants' other arguments. Therefore, I would affirm.

The trial court allowed a previous owner of the servient tract, Thacker, to testify regarding statements made by his grandfather, from whom he had acquired the servient tract. Thacker testified that his grandfather told him that he granted permission for the Crosses to use his tract for ingress and egress. Appellants objected to this testimony as hearsay, and the trial court overruled the objection without specifying the basis for doing so.

Appellants contend that the trial court must have been relying on KRE 803(20), which they contend does not apply, to allow the testimony into evidence.

I agree that the testimony would not be admissible as an exception to hearsay under KRE 803(20) because the statement was made without reputation or general consensus support. *See Chaney v. Justice*, No. 2013-CA-000203-MR, 2014 WL 3537055 at *5-6 (Ky. App. Aug. 12, 2015).

However, in my opinion, the statement was admissible under KRE 801A(c)(2), which applies to statements made by predecessors in interest and provides:

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

Id.

While our Supreme Court chose not to officially adopt the commentary to the Rules of Evidence, the commentary is instructive. It notes that KRE 801A(c)(2) was enacted in large part to codify the well-established common-law exception for statements by those in privity with another. Citing *Williams v. Waddle*, 285 Ky. 416, 148 S.W.2d 298 (1941), the commentators note that this provision was *not* intended to change pre-existing law.

In *William*s, the Court held that:

> [T]he declaration of a deceased person made by him while he was the owner and in possession of land 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.

Id.

In this case, it appears that Thacker's grandfather made the statements at issue while he still owned the property. The statements were made while the grandfather was pointing out to Thacker and explaining to him who had permission to use the property.

Citing *Cadleway Properties, Inc. v. Bayview Loan Servicing, LLC*, 338 S.W.3d 280, 289 (Ky. App. 2010)—the only case discussing the rule—the majority opinion concludes that KRE 801A(c)(2) does not apply to Thacker's statement because "[t]he alleged statement[] . . . [was] not admitted into evidence to prove ownership . . . . [I]t was admitted to prove whether he had intended that the use be permissive."

Thacker testified that his predecessor in interest, his grandfather, told him that he gave permission to the Crosses to use the passway. A statement that one *had* given permission does not merely evince the speaker's *intent* to do something; rather, the statement reveals that Thacker's grandfather bestowed a right on the Crosses which allowed them to use the passway, a right that would not

have otherwise existed.[3] Such a statement goes directly to both parties' interest in the passway. It demonstrates that Thacker's grandfather was the owner of the servient tract, which was subject to a license that he gave to the Crosses to use the passway located thereon. It indicates that the Crosses had a permissive right to use the passway and, therefore, refutes the Crosses' contention that they acquired an interest in the land by way of a prescriptive easement. *See Liberty Nat. Bank & Trust Co. v. Merchant's & Manufacturer's Paint Co.*, 307 Ky. 184, 209 S.W.2d 828 (1948).[4]

While a license can never ripen into a right of full legal ownership by adverse possession or prescription, and is generally revocable at will, a license still gives rights to the grantee and imposes certain burdens on the grantor. *See McCoy v. Hoffman*, 295 S.W.2d 560, 561 (Ky. 1956). By giving permission to the Crosses

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[3] Additionally, if the statement was being offered to show whether the declarant *intended* to grant permissive use of the passway, it would not be hearsay. The statement is hearsay because it was being offered to prove as true the fact that the grandfather granted permission to the Crosses to use the passway.

[4] *Liberty National* was decided pre-enactment of the Kentucky Rules of Evidence. In analyzing the disputed statement, the *Liberty National* court cited to 20 Am. Jur., Evidence § 607, which stated:

> As to the subject matter of the proof, declarations of a former owner are admitted against his successor in interest in respect of any issue of title, ownership, or possession that may be proved by parol evidence—such as the nature, character, and extent of the declarant's possession, the identity or location of boundaries and monuments described in a deed, or any material matter concerning the physical condition or use of the property.

Liberty National concerned a dispute over party wall. Plaintiff claimed exclusive right to the wall. Defendant offered statement of previous owners of plaintiff's lot – statement from a complaint in which they indicate that the party wall was put on the line between their ground and the adjoining lot. Plaintiff contended that the statements were self-serving and, therefore, inadmissible. The Court found that the statement was admissible under the rule because the statement would have been admissible against the declarants in an action brought against them.

to use the land, Thacker's grandfather burdened himself and his land with those obligations. In turn, under certain circumstances, the Crosses could have used the grandfather's grant of permission, *i.e.*, his statement granting them a permissive license against him. *See, e.g., Gibbs v. Anderson*, 288 Ky. 488, 156 S.W.2d 876, 877 (1941); *Holbrook v. Taylor*, 532 S.W.2d 763, 766 (Ky. 1976) ("[T]he license to use the subject roadway may not be revoked."). In any event, the licensee would have prevented the grandfather from holding the Crosses liable for trespass.

After having applied these facts to KRE 801A(c)(2)'s requirements, I believe the statement the grandfather made to Thacker should have been admitted. (1) Thacker's grandfather is a predecessor in interest; (2) the Appellants claimed a right in the property; (3) this case is civil litigation; (4) the Appellants' claim depends on them proving that they were never given permission to use the land, and therefore, their action requires a determination that Thacker's grandfather had full ownership of the property unencumbered by any grant or permissive use or license he bestowed on the Crosses; (5) in the statement at issue the grandfather told Thacker he gave the Crosses permission to use the property, and pointed out the passway to Thacker indicating that his ownership was subject to the permissive license he gave the Crosses; (6) the statement is being offered against Appellants to show that the use was by way of permissive license when the grandfather owned the property; and (7) had the grandfather attempted to sue the Crosses for trespass or had the Crosses attempted to keep the grandfather from revoking the permission, the statement could have been used against him.

Accordingly, I do not believe the trial court abused its discretion when it allowed Thacker to testify that his grandfather, the predecessor in interest, told Thacker that he had given the Crosses a permissive license.

I also do not believe the jury instructions were in error. In the present case, Appellees claimed that use of the passway had been permissive from the inception. If that is the case, Appellants were not entitled to the presumption found in *Ward*:

> Continuous, uninterrupted use of a passway without interference for 15 years or more raises a presumption the use was under a claim of right and the burden shifts to the opposing landowner to present evidence to rebut the presumption showing it was merely permissive. ***However, it 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.*** 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 v. Gilvin, 59 S.W.3d 468, 475–76 (Ky. App. 2001) (emphasis added) (internal citations omitted). Accordingly, if evidence established that use of the passway was initially permissive, Appellants were not entitled to a presumption that they had asserted a claim of right to the passway. In contrast, the burden was on Appellants to show that, subsequent to receiving permission to use the passway, they had made a "distinct and positive assertion of an adverse claim of right" to the

passway and that that assertion was "clearly brought to the notice of the owner of the servient estate." *McCoy v. Hoffman*, 295 S.W.2d 560, 561 (Ky. 1956). Based on Thacker's testimony that the Crosses originally acquired the right to use the passway by express permission, and the lack of evidence demonstrating "some distinct and positive act of assertion of right made clearly known to the owner of the servient tenement[,]" no presumption of a claim of right exists in this case. *Cole,* 59 S.W.3d at 476. Under these facts, I do not believe the presumption was applicable.

Accordingly, for these reasons, I would affirm the trial court.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Angela M. Capps
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