

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION I

CA08-1246

WILMA M. KELLEY & GROVER A.
KELLEY AS TRUSTEES OF THE
KELLEY FAMILY TRUST
APPELLANTS

May 13, 2009

V.

APPEAL FROM THE SCOTT
COUNTY CIRCUIT COURT
[CV 2006-42]

DOUGLAS TRAGER & JOYCE
TRAGER, Husband and Wife,
CHARLIE VAUGHAN, Scott County
Judge, and BENJAMIN J. TRAGER &
PLEGIA A. TRAGER, Husband and Wife
APPELLEES

HONORABLE TERRY M. SULLIVAN,
JUDGE

AFFIRMED

Before us is a road dispute in Scott County involving three neighboring families and the county judge. Appellants, Wilma and Grover Kelley, are trustees of the Kelley Family Trust, which owns land on Ross Creek Road. Appellees Douglas and Joyce Trager, and their son and daughter-in-law, appellees Benjamin and Plegia Trager, own land directly north of appellants' property. The issue in this case is a road from Ross Creek Road traveling through appellants' property to appellees' property. The trial court found that the road was a public road, and the Kelleys now appeal, arguing that there was not sufficient evidence presented to establish a public road. We affirm the trial court.

The Pleadings

The Kelleys filed a complaint alleging that the road was a private road over which the Tragers had a prescriptive easement, and that work crews of appellee Scott County¹ continued to trespass on this road, although it was not a county or public road. The Kelleys sought a declaration of rights between the parties; a finding that Scott County had no interest in the road; an order restraining Scott County from further trespass on the road and the Tragers from widening the road or otherwise significantly modifying it from how it currently exists, other than normal and routine maintenance; and permission to place a gate on the road (to limit access across the property by trespassers and the general public, while providing the Tragers a key to the gate for ingress and egress). Charlie Vaughan, as Scott County Judge, answered the complaint, alleging that the road in question was originally a forest-service road that was turned over to the previous county judge who built a county bridge on the road; that members of the Kelley family were compensated by FEMA after an ice storm (due to the status of the road as a public road serving a number of households); that Scott County had periodically provided maintenance of the public road, including removing a log that was blocking a low-lying bridge on the roadway; and that the public road should not be gated. The Tragers also answered the complaint, alleging that the road was a deeded easement, a county road, and a public easement, and that the road had been used in a continuous, open, and adverse manner. Douglas and Joyce Trager filed a counterclaim, alleging that the road had been used by the general public for a period of more than seven years openly, continually, adversely, notoriously, and non-permissively; that Scott County had maintained the road,

¹ Charlie Vaughan, in his capacity as Scott County Judge, is an appellee.

particularly the bridge on the road, for more than seven years, until recent disputes with the Kelleys had arisen; and that the Kelleys had prevented both Scott County and the Tragers from maintaining the road and bridge. They requested that the trial court confirm that the public road was a county road and that an injunction be entered restraining the Kelleys and their agents from blocking the public road and preventing maintenance on the road and bridge.

The Hearing

At the hearing, prior to any testimony, the Kelleys' attorney stated that they stipulated that the Tragers had a prescriptive easement across the property, and that the only question was whether it was a public or private road. Wilma Kelley testified that when she and her husband purchased their property in December 1997, the road was one lane and went to their house and continued on to what is now the Tragers' property. She referred to it as the driveway, which had a bridge on it where it went to the Tragers' property. By her testimony, the only traffic other than the Tragers that she had seen on the road was the UPS truck and the Tragers' guests. Mrs. Kelley stated that her family had maintained the road, and that the Tragers had graded it a few times to Ross Creek Road. She testified that the bridge sometimes flooded out, at which times she and her husband made the repairs, along with help from the Tragers. She observed that her family found county road crews on the road a few times and had asked them to leave. Mrs. Kelley acknowledged that an application had been made to FEMA for assistance to repair the road after an ice storm. Mrs. Kelley testified that her family used to get along with the Tragers but that for the past three years, the Tragers had

refused to cooperate with them. She noted that their son Mike had previously been married to Douglas and Joyce Trager's daughter. She asked the trial court to find that the road was a private driveway and to allow her to place a gate across the property at Ross Creek Road that could be closed in the case that the road was being "abused," citing as examples the Tragers' grandson racing on the road and trespassers coming on the road in the "middle of the night."

On cross-examination, Mrs. Kelley testified that she did not know that the county had worked on the road; though she recalled one time a long time ago when the county did something to the bridge, she was not sure what it was. She repeated that county road crews had come out on other occasions, but that they had been asked to leave.

Florence Saber, the immediate prior owner of the Kelleys' property, testified that she had constructed the roadbed while she lived on the property so that the Wilkersons, the people who previously owned the Trager property, could cross the creek to their property. According to her, the only people who used the road were her company and the Wilkersons' company. Saber said that she never saw a school bus on the road. Also, she had no trouble with trespassers. Saber denied that the road was a forest-service road, or that the county or the forest service graded and maintained the road. She also recalled that there was not a concrete bridge over the creek when she sold the property.

Buddy Hale, the real estate agent who sold the Saber property to the Kelleys, testified that he was familiar with both properties of the parties. When he first went to the Trager property, he said the road was just a lane; although there was some type of structure built

across the creek, there was not a bridge there. He could not recall the condition of the road at the time he sold the property to the Kelleys, but guessed that it was in about the same condition. Hale could not say if the low-water bridge was in place thirty years ago.

Randy Bottoms, an employee of the U.S. Forest Service, testified that according to his records, the road was not and never had been a forest-service road. He explained that the forest service had no land that the road adjoined and therefore the forest service had no need for the road.

Michael Kelley, the Kelleys' son who had formerly been married to the Tragers' daughter, testified that he became familiar with the property in 1997 before his parents purchased it. He described the road as one lane from Ross Creek Road, including a branch off of it going to his parents' house, with the road crossing the creek onto the Trager property. He said that the road passed Douglas and Joyce Tragers' house, went to Ben Trager's house, and then branched off "up towards the mountain"; he did not know where it ended. Since his parents had owned the property, he said there was always a bridge over the creek, the first one being a small short bridge that had some asphalt on it that was "kind of broken up." He remembered that shortly after moving there, his family found the county pouring cement on the bridge; but he was not sure if the county poured cement on the bridge or if they took everything off and redid it. He said that a county road-crew member told him that they were making the bridge nice so the Tragers could get to the county road. He said that he also saw the county road crew do some trenching, but that the trenching was eventually undone. Kelley recalled that the county concreted or changed the bridge

“somehow” after 1997. He testified that he had seen both his parents and relatives and the Trager family and their friends use the road to come in and out of the property, and that on occasion, a drunk person would come on the property; however, he said he had not seen hunters, fishermen, or school buses use the road. He stated that the mailboxes for his parents and the Tragers were on Ross Creek Road, and that the post office normally did not use the road except for Christmas, when postal workers might deliver packages to the houses. The Kelleys rested after Michael Kelley’s testimony.

Douglas Trager testified that he had lived on his property since 1981; that there was not a bridge across the creek when he moved there; and that he was not sure when the bridge was built, but that in 1987 the county knocked out the old bridge and rebuilt a new bridge. He stated that the county had rebuilt the bridge twice and that the county maintained the bridge between rebuildings. He explained that the first bridge had small tubes in it; the county road crew attempted to put black top on the bridge but it washed off and they came back and concreted it. He said that when the county rebuilt the bridge years later they put bigger tubes in the bridge. Trager stated that the bridge had gotten progressively bigger; that once he established that a school bus could use the road and pick up his grandson, the county graded the road; that the school bus came to pick up his grandson during the fall of 1984 until Christmas; and that the bridge was not in place at that time. He said that a 1998 survey he had prepared indicated that the road was a county road. He also testified that the county maintained the road both at his request and periodically on its own, and that the road was much improved from when he first moved to the property in that it had gravel and was better

graded. Trager could not list specific persons, but he stated that “everybody” used the road. He said that as a field-service engineer, he had business associates who called on him at his office on the property, and that his son’s wife, who sold Avon, received shipments and occasionally had customers come to see her. Trager said that the last time he remembered the county doing any maintenance was December 2007, and that the county judge would not come out any more until the road dispute was resolved. He also said that the fire department came out to look at the bridge and found that it was not safe. He stated that the road had recently deteriorated, and that every time it flooded, the bridge washed out. Trager asked the trial court to recertify the road as a public road. He testified that his son was disabled and his wife had undergone hip surgery, and that they needed to have access to emergency vehicles without first having to find a key to let them onto the property.

Ben Trager testified that he had lived on the property since 1987, and that when he moved there, his father had already done some work to build up the bridge because it was in “rough shape.” According to him, the county began maintaining the road in 1987 or 1988, when they came out and rebuilt the bridge that had broken up. He said that two or three county judges had rebuilt the bridge; that a high-water bridge was not constructed because it was too expensive, although “stringer” tiles were installed that made the bridge higher; and that each time more concrete was used. He said that the county had discontinued maintaining the bridge because of complaints from the neighbors, and that the road had deteriorated rapidly since then. He testified that friends, family, UPS and FedEx trucks, and

his wife's business associates came in and out of the property. He asked the trial court to declare it a public road and to not allow a gate to be placed on the road.

Ronnie Curtis testified that he had lived in Scott County all of his life and that the previous county judge had used county funds to improve private property. In the past twenty-five years, he said he had gone to the Trager property on a regular basis, and that he had lived on the property from 1993 to 1995. He said that he saw the county build a bridge there in the 1990s. He recalled that before the bridge, there was a culvert. He testified that the county had graded the road, and that he had seen a school bus use the road in the 1980s. He said that no one had ever tried to stop him from using the road, and that he thought it was a county road because everyone used it when they wanted to use it.

On rebuttal, James Forbes testified that he was the current county judge, a position he had held for fourteen months. He said that the road was not on the county's 911 maps, and that there was no documentation showing it as a county road. He testified that he had not maintained the road since he took office, but he admitted that there were numerous occasions where a previous county judge had used county funds to improve private property. He advised that he knew nothing about what was done before he became county judge, and he noted that 911 maps had only been in existence three or four years.

Wilma Kelley, the final rebuttal witness, testified that her family had never refused to allow the Tragers to maintain the bridge, but that the Tragers had refused to let her family know what they were going to do with respect to the road. By her testimony, she had no problem with the Tragers maintaining the road, but that she did not want the county to take

the road. She said that the problems with the Tragers regarding the road began about 2004, and that the county had not been out there since that time.

The Ruling

After the hearing, the trial court entered an order finding that while the parties stipulated that it was not a county road, the road in question was a public road. The trial court specifically found that the testimony at the hearing on this matter established

that no obstructions, gates, etc., have ever been placed across the road in question, and the road has been open to use by the general public. From an inspection of the property and the testimony presented, it is clear that the previous County Judges (with the exception of the current County Judge) and the Scott County Road Department have performed substantial work and maintenance on the road over the past 25 years or so. The court finds the bridge to be very impressive with two large culverts, and it is obvious the Scott County Road Department built the bridge and did substantial work on it. Testimony revealed that since 1984, the county has maintained the road and built and rebuilt the road in question, without objection, until the litigation ensued between the parties in approximately December 2006. Testimony also reflected that for a short period of time that the road had been used as a school bus route.

The trial court further found that Plegia Trager had an Avon business, and that FedEx and UPS trucks used the road periodically pertaining to that business. Furthermore, the trial court found that Benjamin Trager was partially disabled, that it would be a grave inconvenience for a gate to be placed across the road, and that there was no necessity for a gate across the road taking into account the previous use of the road in question.

Discussion

Equity cases are reviewed de novo on the record but findings are not reversed unless they are clearly erroneous, meaning that, although there is evidence to support it, the appellate court, on the entire record, is left with a definite and firm conviction that a mistake has been committed. *Owners Ass'n of Foxcroft Woods v. Foxglen*, 346 Ark. 354, 57 S.W.3d 187 (2001). In reviewing a trial court's findings in equity, due deference is given to that court's superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. *Carson v. Drew County*, 354 Ark. 621, 128 S.W.3d 423 (2003).

Arkansas Code Annotated section 27-66-201 (Repl. 1994), provides:

Worked Roads.

All public roads in the several counties in this state on which the several county courts have, from time to time, appointed overseers to work, and directed that hands should be apportioned therefor, shall be declared and deemed to be public roads, without regard to any informality of the several county courts, or either of them, by which they were ordered to be declared public roads in their several counties.

In *Frazier-Hampton v. Hesterly*, 89 Ark. App. 211, 213, 201 S.W.3d 447, 449 (2005), this court, citing *Neyland v. Hunter*, 282 Ark. 323, 668 S.W.2d 530 (1984), held, "A public road does not have to be established by a formal order of the county court; instead, a prescriptive right-of-way can be established by the county working the road for a period in excess of seven years."

With conflicting testimony about how much maintenance was performed and how often the maintenance was done, the trial court found that substantial maintenance and work had been performed on the road by Scott County for over a period of twenty-five years, without objection from the Kelleys until this litigation arose. The testimony of Douglas and

Benjamin Trager, if believed, provides evidence of the bridge being built and rebuilt by county road crews since around 1987, and maintenance being performed in the interim. Our supreme court, in the old case of *Meek v. Love*, 197 Ark. 394, 394, 122 S.W.2d 606, 607 (1938), stated, “The testimony is conflicting as to whether the road had become public, and we are unable to say that the [trial court’s] finding on this question of fact is contrary to the preponderance of the evidence.” In the present case, the testimony on this precise issue is also conflicting, and, like *Meek*, we are unable to say that the trial court’s finding on this question of fact is contrary to the preponderance of the evidence. Therefore, on this set of facts, we affirm the trial court’s decision.

Affirmed.

HENRY and BROWN, JJ., agree.