

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Charles H. King and Constance King,
Plaintiffs Below, Petitioners**

vs) No. 101568 (Monongalia County 08-C-701)

**Fred L. Smith and Martha M. Smith,
Defendants Below, Respondents**

FILED
May 27, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Charles H. King¹ appeals the circuit court's judgment order finding that petitioner had failed to establish the elements required for a prescriptive easement as his use of the driveway in question was permissive. Respondents Fred and Martha Smith have filed their response.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

At issue is petitioner's right to use a driveway that traverses the property of his neighbors, the respondents. There is no express easement to allow such use. Petitioner brought suit because respondents blocked the driveway and prevented his continued use of the driveway. Petitioner alleged that he gained a prescriptive easement by using the driveway for more than ten years and sought declaratory relief. Following a bench trial, the circuit court found that petitioner had used the driveway with permission and, therefore, failed to prove that he had gained a prescriptive easement for such use. The circuit court recognized that Ronald Lewis, the prior owner of petitioner's property, testified that he explained to petitioner at the time he sold the property to him that the use of the driveway was by

¹ As petitioner explains in his petition, the other named petitioner and plaintiff below, Constance King, is not a party to this appeal due to her death.

permission. The circuit court also recognized that petitioner denied that this conversation occurred.

Petitioner argues that the circuit court erred in finding that his use of the driveway road was by permission. Petitioner argues that his testimony, as well as the testimony of his father and his brother, established that no permission was ever given to use the driveway. He notes that respondent Fred Smith testified that he never spoke to petitioner about using the driveway. Petitioner challenges the circuit court's reliance upon the testimony of Ronald Lewis in finding that use of the driveway was by permission.

“In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review.” Syl. Pt. 1, *Public Citizen, Inc. v. First National Bank in Fairmont*, 198 W.Va. 329, 480 S.E. 2d 538 (1996). As the circuit court recognized, “[t]o establish an easement by prescription there must be continued and uninterrupted use or enjoyment for at least ten years, identity of the thing enjoyed, and a claim of right adverse to the owner of the land, known to and acquiesced in by him; but if the use is by permission of the owner, an easement is not created by such use.” Syl. Pt. 1, *Town of Paden City v. Felton*, 136 W.Va. 127, 66 S.E. 2d 280 (1951).

After careful consideration of the record and the arguments of the parties, the Court concludes that the circuit court's finding of use by permission was supported by the testimony of record and was not clearly erroneous, and that it did not abuse its discretion in determining that no prescriptive easement had been established over the driveway in question.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 27, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh