

RENDERED: FEBRUARY 19, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000215-MR

ARLIN HARRIS AND OREIDA HARRIS

APPELLANTS

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 07-CI-01253

DINAH YOUNG

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; BUCKINGHAM,¹
SENIOR JUDGE.

DIXON, JUDGE: Arlin and Oreida Harris appeal the findings of fact, conclusions
of law, and declaratory judgment of the Pulaski Circuit Court, which granted

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

Dinah Young the use of a right-of-way easement on the Harrises' property.

Finding no error, we affirm.

In August 1988, the Harrises executed a boundary line agreement with their then-neighbors, Thomas and Retha Boston. This agreement established a center boundary line with a fifteen-foot easement on both sides of the line for use as a shared right-of-way. The Bostons owned an 11.6-acre parcel, comprised of four tracts (1A, 1B, 2, and 3). The Bostons resided in a house located on Tract 1A, facing the highway. The Bostons also owned a cottage on Tract 1B, located behind Tract 1A. The Bostons' remaining acreage, behind Tract 1B, was undeveloped. The Harrises' home faces Highway 196, and they apparently own undeveloped acreage behind their home. The right-of-way easement provides ingress and egress from Highway 196 via a shared concrete drive, which branches off to access the houses, and ends at the cottage on Tract 1B.

In two conveyances, on August 5, 1988, and September 23, 1988, the Bostons sold their property to James and Dorothy Jones. On April 24, 2003, the Joneses conveyed the property to Darrell and Candice Baker by three separate deeds. Also on April 24, the Bakers executed a deed conveying Tract 2 and Tract 3 to Dinah Young. Three years later, in June 2006, Young purchased Tract 1B from Community Trust Bank following foreclosure of the Bakers' property. Thereafter, as the owner of three of the four former-Boston tracts, Young utilized the shared right-of-way to reach her property. In September 2007, Young filed a declaratory judgment action against Herbert and Brenda Schrader, who now own

Tract 1A, and alleged interference with her use of the easement. On February 26, 2008, Young filed an amended complaint adding the Harrises as defendants to the lawsuit. On May 15, 2008, the court rendered a default judgment against the Schraders, and the litigation continued between Young and the Harrises.

A bench trial was held September 4, 2008. The parties submitted several deeds, photographs, and the boundary line agreement. The court heard testimony from Arlin Harris and Young. Young testified that she purchased the property as an investment and that she wanted to sell it. On January 14, 2009, the court rendered findings of fact, conclusions of law, and declaratory judgment in favor of Young. This appeal followed.

Since this case was tried before the court without a jury, we will not disturb the court's factual findings unless they are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. A finding of fact is not clearly erroneous if it is supported by substantial evidence, which is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). In our review, we are mindful that the trial court is in the best position "to determine the credibility of witnesses and the weight to be given the evidence." *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 118 (Ky. 1991) (citation omitted). We review the trial court's conclusions of law *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

The Harrises contend the circuit court erred in concluding that Young is entitled to use the easement. The Harrises also complain that the trial court erroneously excluded testimony offered by Arlin Harris regarding the intent of the Bostons and the Harrises at the time they executed the boundary agreement. Harris offered the excluded testimony by avowal.

The boundary agreement states in pertinent part:

It is further mutually understood and agreed that there is here created a right-of-way in favor of the parties of the first part and the parties of the second part, their heirs and assigns and successors, in and to a strip of real property 30 feet wide lying 15 feet to either side of the center line and boundary line above established. Both the parties of the first part and the parties of the second part shall have full right of ingress and egress, over and upon said right-of-way.

It is therefore mutually agreed that said line is hereby vested and established as the line between the parties hereto and all persons subsequently deriving title from them and that the said right-of-way described shall inure to the benefit of the parties hereto, their heirs and assigns.

Absent ambiguity, the intent of the parties to an easement agreement must be gathered from the express language of the agreement itself. *Texas Eastern Transmission Corp. v. Carman*, 314 S.W.2d 684, 687 (Ky. 1958). Here, the trial court found the agreement to be unambiguous and ruled that Harris's proffered testimony on intent was inadmissible. We agree with the court's conclusion, and find no error in the exclusion of Harris's testimony.

The Harrises argue that the easement agreement does not expressly provide for the right-of-way to reach Tract 2 and Tract 3; accordingly, they contend the court's holding improperly expands the easement and unfairly burdens their property. In support of their argument, the Harrises cite *McBrayer v. Davis*, 307 S.W.2d 14, 16 (Ky. 1957), which held that a right-of-way easement cannot be enlarged or extended to access tracts that were not part of the original parcel subject to the easement.

Despite the Harrises' argument, we are simply not persuaded that Young's property is excluded from the easement. At the time the agreement was executed, the Bostons owned the entire 11.6-acre parcel. The easement agreement essentially created a reciprocal easement on the Boston and Harris properties. "Reciprocal or cross easements are created by contract between adjacent landowners for the common use of property to enhance the usefulness and value of both properties, usually with respect to ingress and egress. The result is the creation of easements appurtenant to both properties enforceable by subsequent grantors of each original owner." *Meade v. Ginn*, 159 S.W.3d 314, 317 (Ky. 2004). Here, the easement agreement provided "full right of ingress and egress" for the parties and their heirs and assigns. As our Supreme Court stated in *Meade*, *supra*,

It may be considered as settled in the United States that, on the conveyance of one of several parcels of land belonging to the same owner, there is an implied grant or reservation, as the case may be, of all apparent and continuous easements or incidents or property which

have been created or used by him during the unity of possession . . . [.]

Meade, 159 S.W.3d at 321, (citation and quotation marks omitted).

We conclude the easement agreement encompasses all of the property owned by the Bostons at the time the agreement was executed. Accordingly, Young is entitled to use the easement as the owner of Tract 1B, Tract 2, and Tract 3.

The Harrises also contend that allowing Young and any future grantees to use the right-of-way unfairly burdens the easement with increased use. They point out, “The use of an easement must be reasonable and as little burdensome to the landowner as the nature and purpose of the easement will permit.” *Com., Dept. of Fish & Wildlife Resources v. Garner*, 896 S.W.2d 10, 13-14 (Ky. 1995). The reasonableness of an added burden on an easement is a question of fact. *Smith v. Combs*, 554 S.W.2d 412, 414 (Ky. App. 1977). Here, the trial court considered the testimony of Young and Harris, the plat of the property, and the plain language of the easement. The trial court noted that the agreement did not contain language limiting the use of the right-of-way. Pursuant to the plain language of the instrument, the intended use of the easement was as a right-of-way from the highway to the property owned by the Harrises and the Bostons. The instrument specifically contemplated that any future grantees would also enjoy the benefits and burdens of the easement. In light of the evidence supporting the court’s decision, we find no clear error.

For the reasons stated herein, we affirm the judgment of the Pulaski

Circuit Court.

ALL CONCUR.

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