

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

NO. 2009-CA-000267-MR

SEAN STUDER AND CATHLEEN D. STUDER

APPELLANTS

v. APPEAL FROM HARRISON CIRCUIT COURT  
HONORABLE ROBERT W. MCGINNIS, JUDGE  
ACTION NO. 08-CI-00278

WALTER JACKSON  
AND PATRICIA JACKSON

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON AND NICKELL, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Sean and Cathleen Studer appeal the February 6, 2009, order of the Harrison Circuit Court denying their motion to alter, amend or vacate the trial court's November 10, 2008, findings of fact, conclusions of law, and

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<sup>1</sup> Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

judgment. That judgment found in favor of Walter and Patricia Jackson with regards to a property dispute between the parties. In short, the judgment gave the Jacksons unrestricted access to an easement and enjoined the Studers from interfering with said access. We find no error with the trial court's judgment and thereby affirm.

The parties are the owners of three parcels of land which were previously owned by Ralph Hopkins as one parcel. The Jacksons acquired their two parcels, by separate deed, in August of 2002 and August of 2003. The Studers acquired their parcel in October of 2005. The Studers' parcel is subject to an easement running from US 62 to their property. The easement is fifty feet wide and runs between the two lots owned by the Jacksons. The easement is recorded on two plats that have been recorded in the Harrison County Clerk's office. The plats indicate that the easement is to be used for ingress, egress, and utility services. All deeds conveying the parcels to their respective owners reference and incorporate the plats. At the time the Studers acquired their parcel, the easement contained a gravel driveway, located in the center, and there were five access points from the driveway to the Jacksons' parcels.

In August of 2008, the Studers installed fence posts and fencing across some of the access points to the Jacksons' property. The Jacksons then filed a complaint with the Harrison Circuit Court seeking injunctive relief, a declaration

of rights, and monetary damages. The Jacksons sought a temporary, and permanent, injunction requiring the Studers to remove the barriers and to discontinue any future interference with the Jacksons' use of the easement. The Studers filed an answer and counterclaim, in which they denied limiting the Jacksons' property access and alleged that the Jacksons had trespassed and caused damage to the Studers' property. The trial court heard the case on October 7, 2008. On November 10, 2008, the trial court's findings of fact, conclusions of law, and judgment were entered. In that judgment, the trial court ordered that the Studers immediately remove the barriers that were placed across the access points to the Jacksons' property and enjoined them from further blocking or interfering with the Jacksons' use of their property. It was also ordered that no additional blacktop be placed on the driveway. The Studers filed a motion to alter, amend, or vacate the trial court's judgment, which the court subsequently denied. This appeal followed.<sup>2</sup>

The Studers make the following arguments on appeal: 1) the division of the property by Hopkins was illegal, pursuant to KRS 100.277, and therefore must be replatted; 2) the easement fails to meet all requirements to make it valid; 3) the trial court's finding of unlimited scope of use is too broad; 4) the Jacksons'

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<sup>2</sup> The Studers have previously filed with this Court a motion to hold this appeal in abeyance. In said motion, the Studers referenced another civil action, currently before the Harrison Circuit Court, between themselves and the Harrison County Planning Commission. That action addresses the validity of the plat maps which display the easement, an issue that was not addressed by the trial court in its November 10, 2008, judgment. Accordingly, the Studers' motion to hold the appeal in abeyance was denied by an order of this Court, on February 26, 2009.

concrete and asphalt upon the Studers' land constitutes an absolute trespass; and 5) the trial court failed to allocate maintenance costs for the easement among the parties. We will address each argument in turn.

We address the Studers' first two arguments together: that the division of the property was illegal and that the easement fails to meet the requirements that would make it valid. These arguments are without merit for several reasons. First, the Studers failed to make this argument to the trial court. It cannot be found in their answer and counter-claim, and they have failed to otherwise identify where it may be located within the record. It is therefore improperly preserved for our review. *See* CR<sup>3</sup> 76.12(4)(c)(v). Secondly, we note that the Studers failed to join the planning commission in the original action. *See* CR 19.01. The Studers argue that Hopkins obtained an improper signature from the planning commission personnel in order to subdivide his property. Any action which challenges a final action of the planning commission must also include the planning commission as a party. KRS 100.347(2). Third, we note that this issue, as pointed out by the Studers to this Court, is currently being pursued in another circuit court action and is therefore not ripe for our review. Lastly, we note that the Studers failed to motion the trial court for specific findings regarding this issue, as required by CR 52.04. Accordingly, both of these arguments fail.

We next address the Studers' argument that the trial court's finding, that the Jackson's use of the easement is unlimited, is too broad. This court will

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<sup>3</sup> Kentucky Rules of Civil Procedure.

uphold a trial court's findings of fact unless they are clearly erroneous. CR 52.04.

A finding of fact is clearly erroneous when it is not supported by substantial evidence. *Black Motor Co. v. Greene*, 385 S.W.2d 954, 955 (Ky. 1965).

Substantial evidence is defined as "that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." *Bowling v. Natural Res. & Envtl. Prot. Cabinet*, 891 S.W.2d 406, 409 (Ky. App. 1994). When determining whether the findings of fact are supported by substantial evidence, we will not substitute our judgment for that of the trial court. *Bickel v. Bickel*, 95 S.W.3d 925, 928 (Ky. App. 2002).

After a thorough review of the trial court's judgment, we find no finding of fact which delegates unlimited use of the easement to the Jacksons. However, the judgment does contain several legal conclusions which address this issue. We assume that it is these conclusions which the Studers are in fact challenging. Those conclusions state that the easement is for the use and benefit of the Jacksons' property; that the Jacksons are entitled to use the easement for the purposes set out in the plats; and that there are no restrictions on the number of access points allowed by the Jacksons.

The trial court's conclusions of law are reviewed *de novo*. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005). An easement may be established by express written grant, implication, prescription, or estoppel. *Loid v. Kell*, 844 S.W.2d 428, 429 (Ky. App. 1992). In the case at hand, there are plats recording the existence of the easement, and it is therefore established by express written

grant. Because the validity of the plats containing the easement was not addressed by the trial court, we must assume that they are valid. The plats are referenced by, and incorporated into, the deeds which convey the Jacksons' property and the Studers' property to their respective owners. The trial court specifically limits the Jacksons' use of the easement to those purposes stated in the plat: ingress, egress, and utility service. Neither the plats, nor the deeds, limits the number of entrances that the Jacksons may create in order to fulfill their usage of ingress and egress. Accordingly, we find no error with the trial court's conclusions of law regarding the Jacksons' use of the easement.

Lastly, we address the Studers' arguments that the Jacksons' concrete and asphalt upon the Studers' land constitutes an absolute trespass and that the trial court failed to allocate maintenance costs for the easement among the parties. The Studers failed to request findings from the trial court as to these issues. As we have previously noted, a parties' failure to request a finding on a specific issue makes it inappropriate for our review. CR 52.04.

For the foregoing reasons, we hold that the Studers have failed to show error with the trial court's November 10, 2008, findings of fact, conclusions of law, and judgment, and it is hereby affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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BRIEF FOR APPELLEES:

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