RENDERED: JULY 2, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000751-MR

WILLIAM E. BOYCE, JR. APPELLANT

v. APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 06-CI-00195

CITY OF TOMPKINSVILLE,
KENTUCKY APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: MOORE, TAYLOR, AND THOMPSON, JUDGES.

MOORE, JUDGE: William E. Boyce, Jr., appeals from an order entered by the Monroe Circuit Court on September 4, 2007, made final by a subsequent order of April 8, 2009. The order held only that the City of Tompkinsville, Kentucky, "had no right to destroy [a] thirty (30)-foot right-of-way" belonging to Boyce. For the

reasons stated hereafter, we vacate the court's order and remand this matter for further proceedings.

The facts of this case are relatively straightforward. In 1969, the City of Tompkinsville condemned certain acreage belonging to Clifford and Alissa Emberton for use as a drainage basin and lake; the condemnation landlocked the Embertons' remaining acreage. Subsequently, Tompkinsville granted L.S. and Ida McCreary, the inheritors of this acreage from the Embertons, either fee simple title to a road thirty feet in length or an easement of equal length across the condemned tract. The granting instrument from the City to the McCrearys was styled as a "deed of conveyance" and classified the nature of the interest described therein as "fee simple," but also stated "It is understood that this is to be a thirty (30) foot Right of Way."

In 2001, Tompkinsville authorized the bulldozing of the road described in the instrument for the purpose of constructing a horse riding ring on the property and also authorized the placement of a concession stand on that property. The result of these actions made the road impassable.

In 2004, Boyce purchased the McCrearys' interest in the road described in the instrument. Then, on December 21, 2006, he filed this action against Tompkinsville, alleging that, by bulldozing the road and building upon where it once was, Tompkinsville had trespassed upon his land and damaged his property.

The dispositive issue, thus, became whether Boyce had purchased fee simple title to the road in question or some form of easement over it. In the event that Boyce's interest was an easement, it would also be necessary to determine the nature of that easement in order to determine, in turn, the nature of any rights Boyce held with respect to that particular thirty-foot stretch of road. In this regard, Tompkinsville moved for summary judgment on the basis that Boyce's interest was a simple access easement and that, consequently, Boyce was entitled to no relief because an alternative route was available elsewhere.

The issue was complicated, however, by three subsequent orders of the trial court, rendered August 22, 2007, September 4, 2007, and April 9, 2009.

In its first order, entered August 22, 2007, the trial court overruled Tompkinsville's motion for summary judgment and stated in relevant part:

> The question is if there is an easement or right-of-way or is the document [*i.e.*, the granting instrument from Tompkinsville to the McCrearys] a deed or right-of-way. The court believes the issues should be bifurcated. The court will rule on whether the document is a deed or an easement. Depending on the ruling of the court, the issue of damages would come on later. The court will issue a ruling.

In sum, the trial court bifurcated Boyce's action into two separate claims: 1) a declaration of what rights Boyce had under the instrument; and, depending upon that declaration, 2) an action for damages for Tompkinsville's alleged interference with those rights. The trial court also stated it would rule on

the issue of whether this document was a "deed or right-of-way" or an "easement or right-of-way."

The first problem with this order is that it appears the trial court treated the words "deed" and "easement" as mutually exclusive, *i.e.*, it stated that "The court will rule on whether the document is a deed *or* an easement." Whether the trial court meant to use the word "deed," in this context, as a synonym for "a fee simple property interest," it does not say. But, a "deed" by its true definition cannot be mutually exclusive with an easement because it is not, in and of itself, any interest in property. Rather, at common law, a deed is defined as "any written instrument that is signed, sealed, and delivered and that *conveys* some interest in property." *See* BLACK'S LAW DICTIONARY 423 (7th ed.1999) (emphasis added). Furthermore, an easement may be conveyed by deed. For a discussion of this proposition, as well as Kentucky case law regarding it, see A.M. Swarthout, *Deed as Conveying Fee or Easement*, 136 A.L.R. 379 (1942).

The trial court's use of the phrase "right-of-way" adds a further complication because the trial court's use of that phrase is ambiguous. This order either associates "right-of-way" with both a "deed" (which it may have intended to mean "fee simple property interest") and an "easement," or considers it a third, undefined, independent and mutually exclusive type of property interest. In any event, this presents an additional complication because the term "right-of-way" is typically associated with the definition of an easement:

> An interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road). The land benefiting from an easement is called the dominant estate . . . The primary recognized easements are (1) *a right of way* . . .

BLACK'S LAW DICTIONARY 527 (7th ed.1999) (emphasis added).

On September 4, 2007, the trial court followed with a second, interlocutory order,[1] as well as findings of fact and conclusions of law, purporting to declare Boyce's rights under the granting instrument. Neither party contests the findings of fact stated in this order; consequently, the facts of this case, as stated above, are largely a restatement of these findings. Rather, it is the five conclusions of law and the several ambiguities contained therein that warrant attention. Each of these conclusions is addressed, separately, below.

> (1). Boyce contends that the instrument in question is a deed and thus, a fee simple title was vested in the disputed thirty (30)-foot right-of-way. The City contends that the thirty (30)-foot right-of-way was an easement and consequently, did not pass any degree of ownership in the thirty (30)-foot right-of-way to Boyce.

Although the trial court placed this paragraph under the heading, "conclusions of law," it is not a "conclusion of law." CR 52.01 provides that "the court shall find the facts specifically and state separately its conclusions of law *thereon*. . ." (Emphasis supplied.) Here, the trial court is not basing a conclusion

[1] This order only purported to adjudicate Boyce's rights under the instrument and did not adjudicate Boyce's separate and bifurcated claim for damages sustained as a result of Tompkinsville's interference with those rights. As such, this order was interlocutory in nature because it resolved less than all of the claims at issue in this matter and because it did not include the finality language specified in Civil Rule (CR) 54.02.

of law upon any facts; rather, it simply re-phrased the arguments of Boyce and Tompkinsville. Also, as in its previous order, the trial court again associates the phrase "right of way" with both a "deed" and an "easement."

Turning to its second conclusion of law, the trial court stated:

> (2). A deed of conveyance is construed by an analysis of the four corners of the deed for the purpose of ascertaining the grantors' intention and purpose, and all legitimate provisions contained therein will be given effect. *Gabbard v. Short*, 351 S.W.2d 510-511 (Ky. 1961); *Childers v. Welch*, 304 Ky. 700, 202 S.W.2d 169 (Ky. 1947); *Williams v. Williams*, Ky., 259 S.W.2d 53 (Ky. 1953). Generally, a deed must be construed more strongly against the grantor and more favorably to the grantee. *Gabbard*, *supra*, citing *Chaney v. Chaney*, 300 Ky. 382, 189 S.W.2d 268 (Ky. 1945); *Buchanan v. Watson*, Ky., 290 S.W.2d 40 (Ky. 1956). Doubts and ambiguities are resolved in favor of passing a complete title. *Gabbard*, *supra*, citing *Kentland Coal & Coke Company v. Blankenship*, Ky., 300 S.W.2d 570 (Ky. 1957).

In this paragraph, the trial court again makes no conclusion of law. Instead, it cites several cases instructive on how a court should interpret a deed.

Turning to the third conclusion of law, the trial court stated:

> (3). An easement is property in the nature of land, however, it is an incorporeal right, separate and distinct from the right to occupy and enjoy the land itself. *Henry Bickel Co. vs.* [sic] *Texas Gas Transmission Corp.*, Ky., 336 S.W.2d 345, 347 (Ky. 1960) citing *Lyle v. Holman*, 238 S.W.2d 157 (Ky. 1951). An easement is a right *distinguished from ownership, Bickel, supra*, citing *Inter-County Rural Electric Cooperative Corporation v. Reeves*, 294 Ky. 458, 171 S.W.2d 978 (Ky. 1943); 17 Am. Jur. Easements, sec. 2, p. 617. It is not a normal incident of a possessory land interest. *Bickel, supra*, citing Powell, Real Property, Vol. 3, sec 405. It is a

> privilege or an interest in land, *Bickel*, *supra*, citing *Asher v. Johnson*, 118 Ky. 702, 82 S.W. 300, (Ky. 1904) but it is not an *estate* in land nor is it "land" itself, *Bickel*, *supra*, citing Powell, Real Property, Vol. 3, sec. 405; *Chicago, R.I. & P. Ry. Co. vs. City of Ottumwa*, 112 Iowa 300, 83 N.W. 1074, 51 L.R.A. 763. (Emphasis supplied).

This paragraph is also not a conclusion of law because it is simply a series of citations to caselaw regarding easements, rather than a statement of the law with regard to the facts of this case.

Turning to the fourth conclusion of law, the trial court stated:

> (4). This Court concludes as a matter of law that the instrument in question is a deed. The granting clause in this instrument contains language of transfer and the habendum clause is indicative of language utilized in a deed. However, this Court concludes as a matter of law that the property conveyed was specifically stated to be a thirty (30)-foot right-of-way. Consequently, any rights flowing from the right-of-way must be plumbed by legal reasoning.

In this conclusion of law, the trial court does not classify Boyce's interest as an easement or a fee simple interest. Rather, it classifies Boyce's interest as a "right-of-way deed." We are left to guess at the meaning of this phrase because 1) a deed is an instrument capable of conveying either an easement or a fee simple property interest; and 2) between its first order of August 22, 2007, and its first conclusion of law in this order, the trial court associated the phrase "right-of-way" with the phrases "fee simple," "deed," and "easement" without specifically defining it.

Finally, we turn to the trial court's fifth conclusion of law:

> (5). This Court further concludes as a matter of law the record establishes that no restrictions were imposed on the use of the right-of-way. This being so, the right-of-way may be used in such a manner as is necessary in the proper and reasonable occupation and enjoyment of the dominant estate. *Cameron v. Barton*, 272 S.W.2d 40-41 (Ky. 1954). The reasoning set forth in *Newberry v. Hardin*, 248 S.W.2d 427-428 (Ky. 1952), is germane in this action. This language emanates from *Newberry*, supra, at page 428: "...A grant of way over one's premises will be understood to be a general way for all purposes. A right of way granted or reserved without limit of use may be used for any purpose to which the land accommodated by the way may naturally and reasonably be devoted."
>
> The deed contained no words of limitation or restriction as to the character of its use as a right-of-way. The general language of the conveyance was broad enough to include any reasonable use to which the dominant estate might be devoted. The broad, unfettered language contained in this deed distinguishes the case *sub judice* from those relied upon by the City, *Schmid v. Anderson*, 222 S.W.2d 931, 933 (Ky. 1949) (highway right-of-way), *Sherman v. Petroleum Exploration*, 132 S.W.2d 768 (Ky. 1939) (railroad right-of-way).
>
> This Court having entered certain Findings of Fact and having issued certain Conclusions of Law, does hereby ORDER and ADJUDGE as follows:
>
> (1). This Court ADJUDGES that the City had no right to destroy the thirty (30)-foot right-of-way.
>
> (2). That a hearing shall be conducted relating to the issue of damages sustained by Boyce.

(Internal citations omitted.)

In sum, the trial court held that 1) the instrument that Tompkinsville executed in favor of the McCrearys was a "deed," and that 2) Tompkinsville had no right to destroy the road. As such, it purported to resolve the issue of what

Boyce's property interest under the deed was. But, as we plumb the legal reasoning of this opinion, we find several clogs.

On the one hand, the trial court's opinion may stand for the proposition that Boyce received fee simple title to the thirty feet of roadway described in the instrument. The opinion does not specifically state that Boyce's interest is an easement. In its August 22, 2007 order, the trial court held that if it found the instrument to be a deed, then Boyce's interest could not be an easement. And, in its September 4, 2007 order, it found that the instrument was a "deed." Also, we might infer that in Conclusion 1, stated above, the trial court agreed with Boyce's contention that a "deed" is synonymous with a "fee simple property interest." Moreover, the trial court held that the facts of this case were "distinguishable" from *Schmid* and *Sherman*, cited above. Both of those cases held that when land is unconditionally granted for right of way purposes, the deed merely conveys an easement and not a fee simple title to the land. *See Schmid*, 222 S.W.2d at 933; *see also Sherman*, 132 S.W.2d at 772.

On the other hand, the trial court's opinion may stand for the proposition that Boyce merely had an easement over the thirty feet of roadway described in the instrument. The opinion does not specifically state that Boyce's interest is fee simple. The trial court continuously labels Boyce's interest as a "right of way" and defines the nature of this "right" by resorting to *Cameron* and *Newberry*, two cases involving easements, and addressing the scope of this right by stating that it "may be used in such a manner as is necessary in the proper and

reasonable occupation and enjoyment of the dominant estate." This phrase, as well as the inclusion of the "dominant estate" language, defines the nature of rights under an easement. *See Cameron*, 272 S.W.2d at 41.

The specific adjudication of the trial court, *i.e.*, that "the City had no right to destroy the thirty (30)-foot right of way," also does not indicate what the trial court believed Boyce's rights under the instrument were because Tompkinsville would have had no right to destroy the road in the event that Boyce held either an easement over the road or fee simple title. If Boyce held an easement, then Tompkinsville, as the owner of the land that easement crossed, had a duty not to unreasonably interfere with the rights of Boyce, the holder of that easement. *See Ball v. Moore*, 301 Ky. 779, 193 S.W.2d 425 (1946); *Smith v. Price*, 312 Ky. 474, 227 S.W.2d 981 (1950). Similarly, if Boyce owned the road in fee simple, Tompkinsville would have been trespassing when it destroyed the road and placed structures upon it.

On November 28, 2007, the trial court ordered Boyce and Tompkinsville to brief the remaining issues in this matter.

Boyce responded by acknowledging the trial court's prior determination that Tompkinsville had no right to bulldoze the road and that the instrument conveying the interest in the roadway was a "right of way deed," but contended that the trial court had left all other issues open. One critical issue remaining, Boyce argued, was whether he had the right to fence off the road in order to exclude others from using it.

Tompkinsville responded by stating the following:

> To exclude the owner of the subservient estate from its own compatible use of the roadway is contrary to the nature of a right of way: "The granting of a right of way does not entitle the owner thereof to exclusive use of the land but only the use necessary to enable it to exercise its rights." Central Ky. Nat. Gas. Co. v. Huls, 241 S.W.2d 986, 987 (Ky. 1951). This Court has already ruled that, although the nature of the instrument granting Plaintiff a property interest is in the way of a deed, that interest is specified as a right of way, and Plaintiff's rights are to be measured in light of this specification."

Ostensibly, Boyce and Tompkinsville had a new disagreement over whether Boyce had the right to exclude the public, as well as Tompkinsville, from the road at issue. Essentially, however, this was merely a recycling of their original disagreement: whether Boyce held title to the road in fee simple, or whether Boyce simply held an easement over that road. If Boyce held title to the road in fee simple, he would have a right to the *exclusive* use and enjoyment of the land and complete dominion over it for all purposes while his title continued. *See Elkhorn City Land Co. v. Elkhorn City*, 459 S.W.2d 762, 765 (Ky. 1970). However, if Boyce merely held an easement over the road, "[t]he easement did not confer upon the grantee complete or *exclusive* possession. It is ancient law that nothing passes under an easement but what is necessary for its reasonable use and proper enjoyment." *City of Williamstown v. Ruby*, 336 S.W.2d 544, 546 (Ky. 1960) (emphasis added).

Subsequent to this briefing, however, Tompkinsville and Boyce agreed to submit this question to the Court of Appeals, rather than resubmit it to

the trial court. On April 9, 2009, the trial court entered its final order in this matter, styled as "Agreed Order Making Findings of Fact, Conclusions of Law and Order Final and Appealable, and Establishing Liquidated Damages Dependent Upon Outcome of Appeal." In relevant part, this order states:

> The order styled "Findings of Fact, Conclusions of Law and Order" entered September 4, 2007 is herewith deemed "final and appealable." The parties have agreed as follows:
>
> 1. In the event the Court of Appeals determines that the subject "Deed of Conveyance" relating to the 30 foot right of way confers upon the Plaintiff a right of exclusive use of the easement route specified in the instrument, then the parties agree that Plaintiff's remedy shall be payment of the sum of $2,800, representing Defendant's estimate for the cost to return the roadway to its previous condition;
>
> 2. In the event the Court of Appeals determines that the subject "Deed of Conveyance" confers upon the Plaintiff a non-exclusive right to use the easement at the location specified in the instrument, then the parties agree to the amount set forth in paragraph 1 as Plaintiff's remedy in this matter;
>
> 3. In the event the Court of Appeals determines that the "Deed of Conveyance" confers a right of non-exclusive easement across the Defendant's park property which can be relocated to another available route, then the parties agree that the matter shall thereby be resolved.

As a preliminary matter, this Court is at a loss for how to interpret this series of orders. Respectfully, the August 22, 2007 order is ambiguous; the September 4, 2007 order appears to contradict itself as to whether Boyce's interest is fee simple or an easement; and the April 9, 2009 order appears to be an attempt to delegate the trial court's duties to this Court.

Furthermore, final and appealable orders that are ripe for review by this Court, as described by CR 54.01, adjudicate "all the rights of all the parties in an action or proceeding[.]" In light of the contradictions and ambiguities throughout the September 4, 2007 order, it is debatable as to whether the September 4, 2007 order is indeed final and appealable, despite being designated as such by the later April 9, 2009 order.

In any event, however, the inconsistencies and ambiguities in the trial court's orders preclude this Court from resolving this matter; we are a Court of review, but we are unable to decipher an actual decision of the trial court to review. We therefore conclude that it is necessary to vacate the trial court's order of September 4, 2007, and remand this case to the trial court to make additional findings of fact and conclusions of law. Specifically, we instruct the trial court to clarify whether Boyce's interest in the road is 1) a fee simple property interest, or 2) an easement. If the trial court decides that Boyce's interest in the road is in fee simple, then Boyce has the exclusive right to possess the road itself. *Elkhorn City Land Co.*, 459 S.W.2d at 765. If the trial court decides that Boyce's interest in the road is an easement, then Boyce merely has a non-exclusive right to cross over Tompkinsville's property. *Ruby*, 336 S.W.2d at 546. Additionally, if the trial court finds that Boyce's interest is an easement, it will be necessary for the trial court, rather than this Court of Appeals, to determine whether that easement can be relocated to another available route.

TAYLOR, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, CONCURRING IN RESULT ONLY: I concur with the result reached by the majority but differ as to the reasons I believe this case must be remanded to the trial court.

First, I respectfully disagree that the trial court's findings of fact, conclusions of law, and order entered on September 4, 2007, is fraught with confusion. The trial court properly found that the document was a deed that conveyed fee simple title to Boyce which the City had no right to destroy. The term "right-of-way" on which the majority focuses is simply the terminology used to describe the property conveyed. The trial court supported its decision with a well-reasoned opinion and one supported by the applicable law.

However, the appeal should be dismissed because the order appealed was not final and appealable and any opinion we render on the merits would only be advisory. The September 4, 2007, order was clearly interlocutory as it reserved the issue of damages for a later hearing and did not contain any finality language. CR 54.01; CR 54.02.

Jurisdiction cannot be conferred by the parties and is a threshold question for this Court. *Jacoby v. Carrollton Federal Savings & Loan Ass'n.*, 246 S.W.2d 1000 (Ky. 1952). Yet, in an unusual agreed order, that is precisely what the parties attempted to accomplish. Thus, I believe the crucial issue is whether

the parties' agreement constituted a final and appealable conclusion to this litigation.

The agreed order states the September 4, 2007, order is deemed final and appealable but leaves the issue of damages for later adjudication. Therefore, it did not resolve all of the claims between the parties. Although the court has discretion to make such an order final and appealable, there must be a separate determination that "there is no just reason for delay." CR 54.02. It is mandatory that the trial court's judgment recite such determination in addition to the determination that the judgment is final. *Watson v. Best Financial Services, Inc*., 245 S.W.3d 722, 726 (Ky. 2008).

Therefore, I would dismiss the appeal as not final and appealable which would effectively reinstate the trial court's September 4, 2007, order and the litigation would remain on the docket pending a hearing relating to damages.

However, because the majority has remanded the case to the trial court without rendering an opinion on the merits, I concur in the result reached.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Scott Basil Glasgow, Kentucky	H. Brent Brennenstuhl Bowling Green, Kentucky