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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001459-MR

STEVEN PENA AND JOANN PENA — APPELLANTS

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 05-CI-00231

JOHN SWICEGOOD, SHANNON SWICEGOOD, SHANNON HAYES, AND TONYA HAYES — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND CAPERTON , JUDGES; LAMBERT,[1] SENIOR JUDGE.

COMBS, JUDGE: Steven Pena and Joann Pena appeal from a judgment of the Scott Circuit Court involving a dispute over an easement that adjoins the property of the appellees, John and Shannon Swicegood and Shannon and Tonya Hayes. The easement is fifty-feet wide and encompasses Blue Ash Trail, a narrow gravel

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

path providing each of the parties with access to Galloway Pike in Stamping Ground. After our review of the record and the arguments of counsel, we affirm.

The easement at issue in this appeal was initially established in a written "Declaration of Easements and Restrictions" recorded in the Scott County Clerk's office in October 1996. At that time, James W. Singer, Jr., and Ann M. Singer owned fourteen numbered lots in a development known as Blue Ash Subdivision. The primary use of the lots was intended to be residential, but agricultural uses (including livestock) were also permitted. The Singers created the easement for the purpose of ingress and egress across Lot 12, Lot 13, and Lot 14 for the benefit of the owners of the lots. The instrument establishing the easement contained the following provisions that are pertinent to the dispute:

> [A]ll lots in the Subdivision shall henceforth be held, transferred, sold and conveyed subject to the following; (sic)
>
> 1. The Guidelines. The Developer (James W. Singer, Jr., and Ann M. Singer) shall establish a Design Review Board, hereinafter referred to as the "DRB".(sic) The purpose of the DRB shall be to review proposed land use for all lots, and to review plans for all structures. . . .
>
> At its discretion, the DRB may make suggestions in other areas which will preserve or enhance the aesthetic and ecologic integrity of the subdivision. In all cases, the DRB will have final approval rights. No new construction or modification of existing features may occur without the written approval of the DRB.
>
> * * * * *
>
> 5:06. Easements: utility, drainage and roadway easements are reserved over Lots in the Subdivision as

> shown on the recorded Plat. Within these easements, no grading, structure, fence, plantings, or other material shall be paced or permitted to remain which may damage or interfere with the installation and maintenance of utilities, or which may change the flow of drainage channels in the easement, or interfere with, or impede the normal flow of traffic within the Subdivision.
>
> The easement area of each Lot and all improvements on it shall be maintained continuously by the Owner of the affected Lot.
>
> 5:07. Mowing, maintenance, repairs, and improvement of roadway:
>
> The Owner of each Lot in the Subdivision shall be responsible for and bear construction, maintenance and improvement costs of his allocable portion of the roadway from the entrance on Galloway Pike as shown by the recorded plat. The "Allocable Portion" shall be defined as follows:
>
> * * * * *
>
> Lots 12, 13, and 14 will share equally @ 33 1/3 % for Blue Ash Trail. Total length of shared road: approximately 1100 feet.

The Singers recorded a plat that depicted the location and dimensions of the easement.

The parties to this litigation now own the lots previously owned by the Singers. The Penas live at Lot 12, farthest from Galloway Road. The Penas were deeded Lot 12 in November 1996. While a copy of the deed was not made part of the trial court record, no one disputes that the Penas' deed includes the portion of land burdened by the easement. The Penas finished building a house on Lot 12 in November 1998.

The Swicegoods bought a house situated on Lot 13 in June 2001.[2] The Hayeses own Lot 14 at the corner of Blue Ash Trail and Galloway Road. The Hayeses were deeded Lot 14 in 2002; construction of their home was completed in 2003.

The parties' three lots are contiguous with each of them measuring between 5 and 6¼ acres. Across Blue Ash Trail, the length of the easement is bounded by a farm owned by Lancaster, who is not a party to this action. When entering Blue Ash Trail from Galloway Road, one first passes the Hayeses' home, then the Swicegoods' home, and finally the Penas' home. A relatively narrow section of the easement lies between the roadway and the Lancaster farm property across the way. A wider section of the easement lies between the parties' front lawns and the roadway.

In a complaint filed April 10, 2005, the Penas alleged that the Swicegoods and Hayeses had refused to "bear their allocable portion of the construction, maintenance and improvement costs for Blue Ash Trail. . . ." They alleged that Blue Ash Trail was "in disrepair, and in need of construction, maintenance, and improvement in order for it to be passable and returned to useable condition." In a separate count, the Penas sought to collect a portion of the costs associated with their construction of a cattle fence erected along the length of the easement in front of the homes of the Swicegoods and Hayeses.

[2] The Swicegoods' home predates the Penas' home on Blue Ash Trial; it was built by the Swicegoods' predecessors in interest.

The Swicegoods and the Hayeses filed separate answers and counterclaims alleging that the Penas had interfered with their beneficial use of the easement. The Swicegoods and the Hayses sought a declaration of their rights with regard to use of the easement for ingress and egress as well as an injunction seeking to direct the Penas to remove the obstructions in and along the easement and to restrain the Penas from any further obstruction of the easement. They also sought compensatory and punitive damages.

At trial, the parties presented evidence through testimony and exhibits, including numerous photographs of the easement and roadway. We shall summarize and review the evidence as needed for purposes of this appeal.

In 2001, the Penas erected a barrier across the width of Blue Ash Trail at Lot 13. In the summer of 2001, after the Swicegoods had moved into their home, Steven Pena identified the dimensions of the easement to John Swicegood and told him that it consumed about half of the area between the Swicegoods' home and the road. Pena instructed Swicegood to mow the length and width of the easement extending from his (the Swicegoods') driveway to the Hayeses' driveway. The Swicegoods complied with Pena's instructions, but John Swicegood indicated that it was often difficult to meet Pena's expectations for a well-manicured green space surrounding the gravel road.

Before the Hayeses' home was completed in 2003, Steven Pena instructed Shannon Hayes to clean up the portion of the easement nearest his home. Pena told Hayes that the Declaration of Easements and Restrictions required him to

weed and remove tress from his portion of the easement. The Hayeses mowed the designated portion of the easement. In May 2004, Shannon Hayes added gravel to a problem area in the road. Shannon Hayes collected $80.00 from Pena as his contribution toward the improvement. The parties agree that Pena declined Hayes's offer of assistance in the clean-up effort following a severe ice storm in the region.

By 2004, the Penas had become annoyed that the Swicegood children were riding all-terrain vehicles on and near the easement. The Penas addressed their concerns to the developer, Jeff Singer. They complained to Singer that the Hayeses and the Swicegoods were not doing their part to maintain the easement and that they (the Penas) were prepared to erect a fence to protect *their* property. In July and August 2004, the Penas constructed a cattle fence along a portion of the easement directly in front of the Swicegoods' home. The fence was designed to permit the Swicegoods access to their driveway from Blue Ash Trail. The Penas staked the remainder of the anticipated fence to Galloway Road (along the front of the Hayeses' home) and laid out wooden posts to support the wire fencing.

In addition, Joann Pena contacted the garbage collection company providing service to the Hayeses and Swicegoods. She gave the company's representative the clear impression that the Hayeses and Swicegoods lacked any authority to grant the company permission to enter upon the roadway for garbage collection. She implied that the company's truck was not to enter upon Blue Ash Trail. The

company then informed the Hayeses and the Swicegoods that they would collect the trash only from Galloway Road.

In November 2004, Stephen Pena sent the Hayeses and the Swicegoods invoices (by certified mail) for the yard work that he had performed on the easement over the summer and into the fall. He billed them each $260.00 and warned them that "[f]ailure to pay this obligation relinquishes your right to utilize this easement and roadway." The Hayeses and the Swicegoods did not remit payment but built a second narrow gravel road parallel to the first (but outside the easement) and began to use it for ingress and egress.

James Singer, the developer, testified that he did not intend for fencing to be erected along any portion of the easement as fencing would restrict ingress and egress to and from lots that adjoin the easement. James Singer explicitly denied that he had given the Penas permission to erect the cattle fence along the length of the easement.

Both John Swicegood and Shannon Hayes testified about the effect of the obstructions upon their use of the easement. They expressed concern about having sufficient access to their property and dissatisfaction with the aesthetically unpleasing appearance of the woven-wire cattle fence in front of their homes. Swicegood felt that he was entitled to the use of the entire length of the roadway and resented Pena's decision to block Blue Ash Trail beyond Lot 13. Swicegood and Hayes indicated that they had been severely inconvenienced by the changes in their garbage collection service. Additionally, Hayes indicated that he had trouble

navigating around the long wooden posts that the Penas had laid along the edge of the easement to indicate the anticipated location of the cattle fence near the Hayeses' home. Swicegood and Hayes agreed that the Penas had not discussed with them the level of maintenance that the easement might reasonably require and that they found the Penas' expectations hard to accept. The Penas' photographs showed a clearly passable farm road.

Based upon this evidence, the trial court found that the parties had duly mowed a share of the easement area until July 2004 when the Penas erected the woven-wire fence along a portion of the length of the easement. The court also found that the Penas had erected a barrier across the width of the easement at Lot 13, preventing any use of the easement beyond that point.

The trial court found that the Penas are owners of a servient estate and that they had intentionally obstructed and otherwise interfered with the use of the easement by the Swicegoods and the Hayeses. The court found that the Penas had not submitted a written request to the developer for permission to build a fence or to erect any barrier across the easement and that no written permission had been granted. However, the court found that there had been no proof that the Swicegoods or the Hayeses had sustained any actual monetary damages as a result of the Penas' obstruction and interference with the easement.

The Court rejected Steven Pena's contention that he alone could exercise decision-making authority over the easement, concluding that the Penas have no right to obstruct or otherwise to interfere with the beneficial use of the easement by

the Swicegoods or the Hayeses. The court also concluded that no one of the parties could require the other parties to maintain the easement to any level of maintenance other than normal mowing and keeping the right-of-way passable. The trial court granted a permanent injunction restraining the Penas from placing a barrier across the width of the easement and a fence along its length. It ordered the removal of the existing obstructions, and it denied the Penas' request for a contribution toward the erection of the aesthetically objectionable woven-wire fence. The parties were ordered to comply with the requirements of the Deed of Easements and Restrictions. Judgment was entered in favor of the Penas in the amount of $2,040.00 (to be borne equally between the Swicegoods and the Hayeses), a figure reflecting the value of the Penas' lawn care services from 2004. This appeal followed.

Our review of this case is guided by well settled principles.

> In all actions tried upon the facts without a jury . . . the court shall find the facts specifically. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

Kentucky Rule(s) of Civil Procedure (CR) 52.01. Findings of fact are clearly erroneous only if there is no evidence of substance to support them. *Black Motor Co. v. Greene*, 385 S.W.2d 954 (Ky.1964). Issues of law are reviewed *de novo*.

On appeal, the Penas contend that the trial court erred by concluding that they could not erect a woven-wire fence in front of their neighbors' homes or block

use of the road by the Swicegoods and the Hayses beyond Lot 13. We find no error.

The trial court's decision was supported by sufficient evidence, and it wholly conforms to the law. The parties presented evidence to show that there is an express easement across the Penas' property benefitting the property of the Swicegoods and the Hayses. There is no dispute about the location or dimensions of the easement. There was substantial evidence introduced at trial to indicate that the Penas unreasonably obstructed and interfered with the use of the easement by the Swicegoods and the Hayses. In addition, the parties showed that the Penas had failed to obtain any authorization for their decision to alter the appearance of the easement.

Next, the Penas contend that the trial court erred by failing to consider uncontroverted evidence of their damages. Again, we disagree.

In the invoices prepared for the Swicegoods and the Hayses in the second half of 2004, the Penas billed them $260.00 each for their respective share of the lawn service provided by the Penas. The trial court accepted this amount as reasonable and ordered the Hayses and the Swicegoods each to pay their share for 2004, 2005, 2006, and 2007. The trial court did not accept that the Penas had incurred alleged damages of $20,160.00 – the contract price offered to the Penas by a professional landscaping company. We find no error in that determination by the court.

The trial court also declined to order the Swicegoods and the Hayeses to pay a share of the cost of removing particular trees and various stumps that the Penas wanted excavated. Again, we find no error. The trial court properly exercised its sound discretion in rejecting the testimony of landscape professionals, who suggested that certain trees should be removed from the fence line, that certain stumps should be excavated, and that the grass should be mowed on a weekly basis.

Finally, we note that the Penas have complained for the first time on appeal that the trial judge failed to "notify the parties of [a] potential conflict." Appellants brief at 5. Referencing material not contained in the trial court record, the Penas assert that the "interpretation and application of the [Declaration of Easements and Restrictions] in this area will have a direct affect (sic) on the value of the property owned by the in-laws of the Judge, and potentially owned by his wife." *Id.* at 6. The Penas do not argue that the presiding judge was required by the circumstances to recuse *sua sponte*. Instead, they contend that the trial judge should have "made them aware of this situation and allowed them to decide if they felt comfortable. . . ." *Id.* The Penas argue that the court's failure to report the alleged conflict requires us to remand for a new trial.

This court is limited to a review of the record before the trial court, and it is firmly established that a trial court must first be given the opportunity to rule on issues in order for them to be appropriate for appellate review. *Kenney v. Hanger Prosthetics & Orthotics, Inc.,* 269 S.W.3d 866 (Ky.App. 2007) *citing Kaplon v.*

Chase, 690 S.W.2d 761, 763 (Ky.App. 1985)("the function of the Court of Appeals is to review possible errors made by the trial court; if the trial court has had no opportunity to rule on the question, there is no alleged error for the court to review."). The Penas did not file a motion requesting post-judgment relief as to recusal. They never advised the trial court of its alleged error in order to give it an opportunity to consider the issue. Additionally, this alleged error was not properly preserved for review. Therefore, we are precluded from addressing this issue on appeal.

We affirm the judgment of the Scott Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Rocky L. McClintock
Georgetown, Kentucky

BRIEF FOR APPELLEES:

Neil E. Duncliffe
Georgetown, Kentucky