

RENDERED: NOVEMBER 25, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000432-MR

FRED AND ANNA ULSHAFFER

APPELLANTS

v. APPEAL FROM MERCER CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 11-CI-00439

SHAKERS LANDING ROAD ASSOCIATION,
AN UNINCORPORATED ASSOCIATION;
DANIEL B. LOGAN AND EUNICE LOGAN, HIS WIFE;
FRANCOIS BOTHA AND VICKI BELL, HIS WIFE;
LYNN L. SLUSHER; MATT NOFFSINGER
AND VICKI NOFFSINGER, HIS WIFE; BOB POWERS
AND DONNA GAUTIER, HIS WIFE; JOHN HANCOCK;
STEVE HIRSCHBERG AND KATHY HIRSCHBERG,
HIS WIFE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND KRAMER, JUDGES.

CLAYTON, JUDGE: This is an appeal of a decision by the Mercer Circuit Court in a declaration of rights action. The circuit court held that the construction and maintenance of a gate to a subdivision's private roadway was part of the maintenance of that roadway. Based upon the following, we affirm the decision of the circuit court.

BACKGROUND SUMMARY

The Shakers Landing Road Association (the Association) was created by agreement of the landowners living along a road in the Shakers Landing subdivision on April 16, 1994. The road is a private right of way which leads to the homes in the subdivision. The agreement was recorded in the Mercer County Deed Book and listed as its purpose "to maintain the road known as 'Shakers Landing Road', and make such improvements as determined to be needed by the Association." It was also set forth in the agreement that it would "be binding upon all subsequent owners and their successors and shall be a restriction binding upon all future lot owners perpetually."

In September of 2001, the members agreed by a majority vote to build and maintain an electric gate across the roadway. The Appellants brought an action in the Mercer Circuit Court seeking a declaration of rights as to whether the construction and maintenance of the gate was a proper act under the agreement. They asserted that "[t]he installation, maintenance, and expense of the electric gate are neither maintenance of Shakers Landing Road nor improvements to that road." They asked for "recovery from the responsible persons disbursing association

funds improperly for expenses arising out of the electric gate, and the necessity of additional dues or assessments at this time for maintenance of the road.”

The circuit court held that “[b]ecause the majority of landowners voted in favor of the installation of the gate, it is clear to the Court that the landowners did so in an effort to provide better security to the street, which would be considered as improvement.” The circuit court went on to hold that, under the agreement, the majority vote would bind all the landowners and their successors.

The Appellants then brought this appeal.

STANDARD OF REVIEW

On appeal, “[f]indings 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 Rules of Civil Procedure (CR) 52.01; *A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 509 (Ky. App. 1999). On the other hand, conclusions of law are subject to independent appellate determination. In this regard, “[t]he construction and interpretation of a contract ... are questions of law to be decided by the court.” *Id.* With these standards in mind, we examine the merits of the case.

ANALYSIS

The circuit court held that the electric gate was an improvement to the road and, therefore, a legitimate expenditure under the Agreement. There was testimony at the hearing that the road was being used by large trucks who had

mistaken it for a road which leads to the boat ramp at Shaker's Ferry Landing.

Thus, the appellees argued before the circuit court that the gate not only addressed security concerns, but also addressed traffic reduction which protected the roadway.

The Agreement sets forth that “the majority vote on any Motion shall bind all property owners, or their heirs, assigns and successors.” Appellants contend that the evidence presented to the circuit court was not the “best evidence” since it was not in the minutes of the meeting. In this case, the circuit court was asked to construe what constitutes “maintenance and improvements” of the roadway pursuant to the Agreement at issue. In *The Villas at Woodson Bend Condominium Ass’n, Inc. v. South Fork Development, Inc.*, 387 S.W.3d 352, 357 (Ky. App. 2012), a panel of our Court held that “[w]e are required to use the common meaning and understanding of the words utilized in a deed and will not infer or substitute intent for what was actually said.... Further, a deed shall be construed based upon its provisions as a whole.”

The circuit court held that:

Because the majority of landowners voted in favor of the installation of the gate, it is clear to the court that the landowners did so in an effort to provide better security to the street, which would be considered as improvement. Although the plaintiff voted against the gate, the court would note that, for a number of years, pay the roadway assessment. [sic]

As to whether the landowner's vote is binding on all landowners, the Agreement clearly states “[t]he majority

vote shall bind all landowners and their successors.” As such, the court finds that the plaintiffs are bound by the decision of the Shakers Landing Road Association.

The circuit court properly held that there was evidence that the gate was for protection of the road which was an appropriate reason under the Agreement. The circuit court also correctly held that all members of the Association were bound, under the Agreement, by a majority vote. Thus, we affirm the decision of the circuit court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Richard Clay
Danville, Kentucky

BRIEF FOR APPELLEES:

David Patrick
Harrodsburg, Kentucky