ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE

DIVISION I

CA07-603

FEBRUARY 13, 2008

MAX CALDWELL APPELLANT	APPEAL FROM THE CROSS COUNTY CIRCUIT COURT [NO. CV-2005-162-3]
V.	HON. BENTLEY E. STORY,
TOMMY DALE KEELING and BECKY KEELING APPELLEES	CIRCUIT JUDGE AFFIRMED

Appellant Max Caldwell appeals the February 8, 2007 decree of the Cross County Circuit Court, wherein the trial court determined that the gates erected by appellees, Tommy and Becky Keeling, were an unreasonable obstruction to appellant's easement, but that electric gates across the easement would not be unreasonable. Further, the trial court ruled that the recorded easement should be reformed to reflect the legal description of the existing road. Appellant contends that the trial court erred in allowing appellees to erect electric gates across his easement and in extinguishing the easement as originally recorded. Appellees argue on cross-appeal that the trial court erred in finding that the erection of gates across the easement was an unreasonable restriction. We affirm.

Facts

The easement at issue herein was first conveyed on February 9, 1987. At that time, appellees' land was owned by Jimmy South and Sandra South (now Lamb), who conveyed the easement to Sandra's parents, Dick and Juanita Lindley, previous owners of appellant's land. The Souths gave the Lindleys an easement for ingress and egress to the Lindleys' property. At that time, the Lindleys raised peaches on their land for Gerber and others, and the easement was necessary for the farm equipment to have access from the highway to the peach orchard. The testimony at trial revealed that the Souths intended to convey an easement running along a gravel road that had been in existence for about fifty years. It was discovered after the conveyance that the recorded easement did not convey an easement along the existing gravel road but rather along a path somewhere to the south of the road. However, no documents were ever executed or recorded to amend the recorded easement to reflect the parties' intent.

Juanita Lindley, who became widowed, conveyed her land to her daughter, Sandra Lamb, who in turn conveyed the land to appellant in two parcels. The northernmost parcel consisting of forty-five acres was conveyed to appellant on January 30, 2004. The remaining forty-five acres was conveyed to appellant on January 13, 2006. The easement rights of ingress and egress were conveyed with the land. Appellees acquired their land, which had been previously owned by the Souths, through a chain of conveyances. Their immediate predecessor in title, Bobbie Garner, executed a deed in appellees' favor on February 11,

2005, "subject to all existing easements of record or by other agreements for ingress/egress, roadways, and utilities."

Appellees tore down the existing fence along the north side of the existing road and expanded the pasture to the south side of the existing road. Appellees then erected a barn on the south side of the road either on or very close to the recorded easement. Appellees then erected two gates on the existing road after they discovered that the cattle guards they had installed did not prevent their horses from escaping the pasture. Because of the gates, and in order to utilize the easement, appellant must arrive at the first gate, get out of his vehicle, open the gate, get back into his vehicle, drive through the gate, get out of his vehicle, close the gate, and return to his vehicle. He must repeat this process for the second gate, and again for both gates when leaving the property. Further, appellant must be on guard for appellees' horses and take appropriate measures to ensure that the horses do not escape during the gate-opening-and-closing process.

The gates were erected after appellant acquired the first forty-five acre tract, but before appellant acquired the second forty-five acre tract. Appellant has used the property for hunting purposes only, but testified that he would like to employ someone to farm and harvest peaches from the peach orchard. However, he claimed that the existence of the gates has dissuaded local peach farmers from farming his orchard. Further, appellant's ninety acres is situated directly across from a twenty-seven hole golf course under construction at Village Creek State Park. Appellant wants to develop part of his property into residential tracts, and he believes his property would be attractive to investors because of its proximity

to the golf course. He testified that developers would not be interested in property obstructed by gates.

The trial court found that the issue between the parties was the degree of reasonable and free use of the existing easement that appellant, as the dominant estate owner, can demand and the degree of reasonable restrictions on the use of the existing easement appellees, as the servient estate owners, can assert. The trial court determined that the gates as erected were an unreasonable obstruction of appellant's easement. However, the trial court found that the erection of electric gates would not be an unreasonable obstruction. Further, the trial court ruled that the recorded easement should be reformed to reflect the intention of the previous owners, which corrected the legal description to that of the existing gravel road. This appeal followed.

Statement of law

Arkansas law regarding obstruction of easements is well-settled, and has been summarized as follows:

> The general rule regarding the obstruction by fences or gates of such private easements by the owner of the servient estate is that a fence may not be erected so as to entirely obstruct the way, but that unless it is expressly stipulated or it appears from the terms of the grant or the surrounding circumstances that the way shall be an open one, without gates, the owner of the servient estate may erect gates across the way if they are so located, constructed or maintained as not unreasonably to interfere with the right of passage, when they are necessary for the preservation and proper and efficient use of the lands constituting the servient estate. 28 C.J.S. Easements s 98(b), p. 781; 25 Am.Jur.2d 497, s 91. *See Hockersmith v. Glidewell*, (Ark. unreported) 153 S.W. 252; Restatement of the Law of Property, Servitudes, s 486.

Jordan v. Guinn and Etheridge, 253 Ark. 315, 321, 485 S.W.2d 715, 719 (1972).

"Pertinent factors to be considered include the terms of the grant, the intention of the parties as reflected by the circumstances, the nature and situation of the property and the manner in which it has been used and occupied before and after the gant, and the location of gates." *Id*., 253 Ark. at 322, 485 S.W.2d at 720. The question of reasonableness is a fact question. *Id*. The trial court's findings in this regard will not be reversed unless they are clearly erroneous. *Wallner v. Johnson*, 21 Ark. App. 124, 730 S.W.2d 253 (1987).

Reformation of easement

Appellant contends that the trial court erred in extinguishing the recorded easement by ruling that the existing road should be the proper easement. Appellant asserts that the original recorded easement is still valid, and argues that even though the proof at trial indicated that the original grantors of the easement intended for it to coincide with the existing road, no documents have been executed to terminate or extinguish the recorded easement. He also argues that the deed recorded herein put the parties on notice that there may be two easements, one recorded and one by prescription. He claims that he has two easements, one recorded in the land records and one by prescription across the existing road. He asks that the trial court's ruling extinguishing his recorded easement be reversed.

Appellees maintain that the trial court was correct in ruling that appellant's recorded easement was extinguished upon reformation of the easement. They assert that at the trial-court level, appellant argued that the original easement should be reformed due to mutual mistake of the predecessors in title. We agree, and therefore affirm the trial court's ruling. Even as to constitutional claims, a party is bound on appeal by the scope and nature of the

arguments and objections made at trial; a party cannot change the grounds of an objection on appeal. *Holland v. State*, 71 Ark. App. 84, 27 S.W.3d 753 (2000). Accordingly, the trial court's ruling extinguishing the recorded easement and reforming it to reflect the description of the existing gravel road is affirmed.

Reasonableness of erecting gates

Appellant claims that the trial court was correct in determining that placing gates across the easement constitutes an unreasonable restriction. However, he contends on appeal that the trial court erred in ordering appellees to erect electric gates, arguing that the erection of any type of gate is unreasonable. On cross appeal, appellees claim that the trial court's finding of unreasonableness should be reversed, thus eliminating the requirement of electrical gates. Combining these points, this court addresses the question of reasonableness raised in both claims.

Appellant maintains that the trial court's analysis under *Jordan*, *supra*, was well reasoned. The trial court noted that an obstruction across the existing road would have been very cumbersome for the intended use and purpose of the easement, which was to allow the free travel of large farm equipment and transport trucks across the appellees' land. The trial court opined that opening and closing a gate once a day is not unusual or unreasonable for hunters, and we agree. However, the trial court further found that for farmers using the

easement, opening and closing a gate many times a day would be cumbersome and unreasonable, and therefore, a mechanical gate is required to achieve reasonableness.

Appellant further argues that the intention of all previous owners favors removal of the gates. He claims that all previous owners intended for the easement to remain unobstructed, and points out that the trial court noted in its opinion that at no time in the past has the property owned by appellees been used in such a way as to interfere with the easement. Appellant argues that the small benefit of adding about one-and-a-half acres to appellees' pasture does not outweigh the burden to appellant of having his easement obstructed. Further, appellant argues that the erection of gates hinders his future use of the property. He contends that local peach farmers refuse to farm his orchards because of the gates and that the gates prevent him from developing his property.

Therefore, appellant argues that the trial court correctly applied the *Jordan* balancing test to the gates as they existed at the time of trial, finding that they were an unreasonable restriction on appellant's easement. However, appellant argues that the trial court erred in holding that electric gates not yet erected would be reasonable. We decline to find appellees' placement of gates across the easement an unreasonable restriction on the easement.

Appellees contend, and we agree, that the evidence showed that they enlarged their pasture by moving the fence to the south side of the roadway. The evidence demonstrated that appellees needed the pasture for their three horses and children. The gates proved to be necessary to keep the horses from escaping, as the cattle guards were not working. Further, appellees argue that they offered to install electrical gates after appellant filed the lawsuit,

but appellant declined. Appellees claim that appellant did not offer any proof, other than his inconvenience in stopping and opening the gates, that the unlocked gates interfered with his use and enjoyment of the property. We agree.

Appellees rely upon *Wallner v. Johnson, supra*, where this court held that the maintenance of an unlocked gate across a roadway did not materially interfere with the use of the roadway. Appellees argue that the easement granted herein was limited to ingress and egress. They claim that appellant wanted the court to grant a much broader easement that would unreasonably interfere with their right to use and enjoy their property by limiting the pasture for their horse and separating the pasture from the barn. They ask that the ruling regarding removal of the unlocked gates be reversed.

A fact-question is to be determined by the trial court, and we will not disturb the finding unless it is clearly erroneous. *Jordan, supra*. Noting the trial court's findings regarding the cumbersome nature of the gates and the intended use of the easement, as well as the trial court's consideration of the effect of the gates on both parties, we cannot say that its determination that a mechanical gate is a reasonable restriction is clearly erroneous. Relying on the particular facts herein, we hold that the trial court's error was in finding gates across the easement to be unreasonable. The trial court equated an inconvenience with unreasonableness. These are not identical. Appellees' gates did not interfere with the right of passage, only the ease of passage. Further, logic does not allow the trial court to find that a gate is an unreasonable restriction and then order that a gate be erected. Therefore, in light

of the foregoing, we uphold the trial court's finding on cross appeal that a mechanical gate is a reasonable restriction on the easement.

Affirmed.

BAKER, J., agrees.

PITTMAN, C.J., concurs.

PITTMAN, C.J., concurring. I respectfully concur with the decision to affirm the trial court's judgment in this case. The trial court issued an extensive letter opinion that was incorporated into its decree. In addition to summarizing the evidence and pertinent law, the opinion included the following:

> 19.5. The gates have not been padlocked by the [appellees/cross-appellants]. However, the gates require the [appellant/cross-appellee], when he crosses the existing road, to (1) stop his vehicle and get out, (2) open the gate, (3) get in his vehicle and pull forward, (4) stop his vehicle and get out, (5) close the gate, and (6) get back in his vehicle. He has to do this on the other end of the existing road. When he returns from the peach orchard, he has to repeat this process.
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> 20. Based on the above, it is this court's opinion that the erection of gates on the existing road is an unreasonable restriction placed on the domina[nt] estate by the servient estate. Therefore, the [appellees/cross-appellants] may not place gates across the existing road. The [appellees/cross-appellants] may, however, erect gates across the existing road which require the [appellant/cross-appellee], and his assigns, to activate the gates in some manner and method.

Reading the entire letter opinion and decree in context,[1] it is clear to me, as it is to the parties to this case, that the trial court was finding only the then-existing, *manual or conventional* gates to be an unreasonable restriction on use of the easement under the circumstances of this case. The court found, on the other hand, that erection of *electrical or mechanical* gates, which could be activated by users without the unduly cumbersome requirements imposed by manual gates, would *not* be an unreasonable restriction. On this record, I cannot conclude that these findings are clearly erroneous, and I concur in the affirmance of the judgment on both appeal and cross-appeal.

[1]*See, e.g., Gibson v. Gibson*, 87 Ark. App. 62, 185 S.W.3d 122 (2004) (judgments are construed like any other instrument as a general rule; the determinative factor is the intention of the court as gathered from the judgment itself and the record).