Cite as 2011 Ark. App. 510

# ARKANSAS COURT OF APPEALS

DIVISION I
**No.** CA10-1261

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| WILLIAM C. WRIGHT and LADELLE WRIGHT<br>APPELLANTS<br><br>V.<br><br>ANDY BRIANT and TERRI BRIANT<br>APPELLEES | **Opinion Delivered** SEPTEMBER 7, 2011<br><br>APPEAL FROM THE DREW COUNTY CIRCUIT COURT, [NO. CV-07-52-4]<br><br>HONORABLE DON EDWARD GLOVER, JUDGE<br><br>AFFIRMED |

**RAYMOND R. ABRAMSON, Judge**

This case involves a dispute between adjacent landowners concerning a septic system. The appellants are William C. and Ladelle Wright. The appellees are Andy and Terri Briant. The properties purchased by these parties were originally owned by Donald and Lavelle Johnston. While the Johnstons owned the property, they placed a mobile home on the property and connected it to an existing septic tank. As a result, there were two homes on the property being serviced by one septic tank.

In August 1999, the Briants purchased the mobile home and approximately two acres upon which it was situated from Johnston. The septic tank servicing the mobile home, however, was located on the remaining acreage owned by the Johnstons. The Wrights purchased the other home and remaining acreage in March 2004. Neither deed referenced any easements for septic use. Mr. Wright stated that, at the time of his purchase, he was not aware that the septic tank on his property was servicing the mobile home. Although no sewer lines serviced the

properties, Mr. Wright admitted that he never inquired into the status of the septic system. When Mr. Wright discovered that the Briants were using the septic tank, he requested that they purchase and install their own septic system. The Briants attempted to have a separate septic system installed but were informed that their land would not "perk." The Briants also asserted that their property was not large enough to install an independent septic system. Mr. Wright claimed that the property was large enough to support a separate system.

When the Briants failed to install their own septic system, Mr. Wright had the septic lines to the Briants' mobile home capped-off, resulting in sewage backing up into the home. The Briants subsequently filed suit against the Wrights alleging, among other things,[1] that the Wrights had interfered with the sewage easement they obtained when they purchased their property from the Johnstons.

Following a hearing, the trial court found that the Briants possessed an easement by necessity[2] to the septic tank located on the property belonging to the Wrights. The court further

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[1]The Briants also alleged that the Wrights had disconnected a shared water line and that there was a dispute regarding the property line. The property-line dispute was also the subject of the Wrights' counterclaim against the Briants. The court's rulings on these issues are not the subject of the appeal and are therefore not addressed.

[2]The parties and the court denoted this an "easement by necessity" when in fact it more properly should be denoted an easement by implication. An easement by implication arises where, during unity of title, a landowner imposes an apparently permanent and obvious servitude on part of his property in favor of another part, and where, at the time of a later severance of ownership, the servitude is in use and reasonably necessary for the enjoyment of that part of the property favored by the servitude. *See Diener v. Ratterree*, 57 Ark. App. 314, 945 S.W.2d 406 (1997). By contrast, an easement by necessity allows for a route of access where one previously did not exist. Here, as the access, if any, was present at the time of severance, the easement should more properly have been denoted one by implication rather than by necessity. However, any problem in the misidentification of the easement by type is harmless as the trial court referenced and used the correct standards for determining an easement by implication.

found that the Wrights knew or should have known of the shared septic tank servicing both properties and that the Briants had no reasonable alternative for sewage removal from the home. The court then enjoined the Wrights from interfering with the Briants' use of the septic system and awarded damages to the Briants for the damages they suffered as a result of the septic system being disconnected. The Wrights filed a timely notice of appeal from the trial court's order.

On appeal, the Wrights, citing *Diener v. Ratterree*, 57 Ark. App. 314, 945 S.W.2d 406 (1997) and *Hanna v. Robinson*, 86 Ark. App. 180, 167 S.W.3d 166 (2004), argue that the trial court erred as a matter of law in holding that the Briants held an easement by necessity to the septic system. They argue that the trial court never made the requisite finding that the easement was necessary to the enjoyment of the Briants' property at the time the property was severed by its common owner and that there was no evidence presented to support such a finding. They note that there was no expert testimony or other documentation regarding whether the property had "perked" or whether the property was large enough to support a separate system at the time of trial, much less at the time of severance. They claim that the only evidence that the property could not be serviced by a separate septic system was the testimony of Mr. Briant and that this was insufficient. They argue that the trial court granted the easement because it was convenient to the Briants, not because it was necessary to their enjoyment. Therefore, they assert that the granting of the easement should be reversed.

First, we note that the Wrights' argument on appeal fails because they did not make this specific argument to the trial court. In their posttrial brief, the Wrights argued that there was no evidence that the Wrights had actual knowledge of the existence of the septic tank at the time

they purchased the property or that the septic tank serviced the adjacent land owned by the Briants. Nor did they have constructive knowledge as the Briants failed to secure an easement documenting the existence of the septic tank. The Wrights further argued that there was no unity of title between the Wrights' tract and the Johnston/Briant tract at the time the Wrights purchased the property in 2004. Their last argument to the trial court was that Mr. Wright had testified that the Briants were eligible for a septic tank permit on their land, rendering the easement unnecessary. They did not argue, as they do here, that there was no evidence of necessity at the time of severance.

It is a basic rule of appellate procedure that a party cannot change arguments on appeal, and we do not address arguments that were not raised below. *Williams v. Liberty Bank*, 2011 Ark. App. 220, --- S.W.3d ---. The fact that this court reviews easement cases *de novo* does not affect this outcome. With regard to arguments raised for the first time on appeal, the supreme court has stated that "[*d*]*e novo* review does not mean that this court can entertain new issues on appeal when the opportunity presented itself for them to be raised below, and that opportunity was not seized." *Lamontagne v. Ark. Dep't of Human Servs.*, 2010 Ark. 190, --- S.W.3d ---; *Roberts v. Yang*, 2010 Ark. 55, ___ S.W.3d ___.

We would also affirm on the merits. As stated above, we review easement cases *de novo*. *Diener v. Ratterree*, *supra*. However, we will not reverse the trial judge's findings unless they are clearly erroneous. *Id.* The person asserting the easement has the burden of proving the existence of the easement. *See Kennedy v. Papp*, 294 Ark. 88, 741 S.W.2d 625 (1987); *R & T Props. v. Reyna*, 76 Ark. App. 198, 61 S.W.3d 229 (2001).

An easement by implication arises where, during unity of title, a landowner imposes an

apparently permanent and obvious servitude on part of his property in favor of another part and where, at the time of a later severance of ownership, the servitude is in use and is reasonably necessary for the enjoyment of that part of the property favored by the servitude. *Hanna v. Robinson*, *supra*; *see also Manitowoc Remfg. Co. v. Vocque*, 307 Ark. 271, 819 S.W.2d 275 (1991); *Kahn v. Cherry*, 131 Ark. 49, 198 S.W. 266 (1917); *Kralicek v. Chaffey*, 67 Ark. App. 273, 998 S.W.2d 765 (1999). In order for such an easement to be established, it must appear not only that the easement was obvious and apparently permanent but also that it is reasonably necessary for the enjoyment of the property, the term "necessary" meaning that there could be no other reasonable mode of enjoying the dominant tenement without the easement. *Hanna v. Robinson*, *supra*. *See also Greasy Slough Outing Club, Inc. v. Amick*, 224 Ark. 330, 274 S.W.2d 63 (1954). Whether an easement is apparent and necessary is ordinarily a question of fact. *Diener v. Rattarree*, *supra*; *Greasy Slough Outing Club v. Amick*, *supra*.

Apparentness of use does not necessarily "mean actual visibility, but rather susceptibility of ascertainment on reasonable inspection by persons ordinarily conversant with the subject." *Diener v. Rattarree*, *supra* (quoting 25 Am. Jur. 2d *Easements & Licenses* § 30 (1966)). Each case must necessarily depend upon its particular facts. Here, Mr. Wright, like the appellants in *Diener*, knew that the property he purchased was not serviced by a sewer system and even admitted as much. He further knew that a mobile home was located on the Briants' property. Finally, he knew, or should have known, from the property description in his warranty deed that he was purchasing property which, at one time, had been part of a larger parcel from which the Briants' property had been severed. Despite this knowledge, he did not inquire into the status of the septic tank and/or leach lines that serviced his property. "The general rule is, that whatever puts

a party upon inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty as in the case of vendor and purchaser, and would lead to the knowledge of the requisite fact, by the exercise of ordinary diligence and understanding. Or, as the rule has been expressed more briefly, where a man has sufficient information to lead him to a fact, he shall be deemed cognizant of it." *Hannah v. Daniel*, 221 Ark. 105, 108, 252 S.W.2d 548, 550 (1952) (quoting *Waller v. Dansby*, 145 Ark. 306, 224 S.W. 615, 617 (1920)). Thus, we cannot find that the trial court's finding that the Wrights knew or should have known of the shared septic tank was clearly erroneous.

Nor can it be said that the trial court's determination that the easement was necessary was clearly erroneous. Here, Mr. Wright admitted that there were no sewer lines servicing the area. Although Mr. Wright testified that it was his understanding that the Briants could have, and in fact did, obtain a permit to build a separate septic system on their property, Mr. Briant testified otherwise. Mr. Briant testified that he had attempted to obtain a separate system, but that his property would not "perk" and that his parcel was not large enough to accommodate its own system. The trial court apparently deemed Mr. Briant's testimony more credible. Disputed facts and determination of the credibility of witnesses are within the province of the circuit court, sitting as trier of fact. *Heartland Community Bank v. Holt*, 68 Ark. App. 30, 3 S.W.3d 694 (1999).

The Wrights also complain that there was no expert testimony or documentation regarding the necessity of the easement. However, the Wrights presented no case law in support of their argument that expert testimony is required in this context. This court has repeatedly held that where an appellant has cited no authority for his argument, we will not consider the merits of it. *See Webb v. State*, 327 Ark. 51, 63, 938 S.W.2d 806, 813 (1997).

Finally, the Wrights are correct that it is the necessity at the time of the conveyance that governs. *Greasy Slough*, 224 Ark. at 338, 274 S.W.2d at 68. The parties testified that there are no sewer lines in the area and a septic system is reasonably necessary to the property owner's use of the property. Mr. Briant testified that his land would not "perk" and that it was too small to support an independent septic system. As the size and nature of his property has not changed since the time of the conveyance, it is only logical that the property could not have supported an independent septic system at the time of severance either. The trial court's findings were not clearly erroneous.

Affirmed.

ROBBINS and GRUBER, JJ., agree.