

ARKANSAS COURT OF APPEALSDIVISION I
No. CA12-633TERRY DRAY AND TONIA D. DRAY
APPELLANTS

V.

JUSTIN L. LIKENS AND ERIN R.
LIKENS
APPELLEES

Opinion Delivered February 20, 2013

APPEAL FROM THE CRAWFORD
COUNTY CIRCUIT COURT,
[NO. CIV-2010-597]HONORABLE MICHAEL MEDLOCK,
JUDGE

AFFIRMED

PHILLIP T. WHITEAKER, Judge

Appellants Terry and Tonia Dray appeal a Crawford County Circuit Court order granting an easement to appellees Justin and Erin Likens for a water line across their property. We affirm.

Prior to 2001, Mid-Ark Property Management, Inc., acquired title to a parcel of real property in Crawford County, Arkansas, and platted the property into thirteen separate tracts. On October 29, 2001, the Likenses entered into a purchase-and-sale agreement with Mid-Ark to purchase approximately half of Tract 13. The other half of Tract 13 was purchased by Kyu Shun and Selena Lee, who were friends of the Likenses. The real estate contracts for both the Lees and the Likenses stated that Mid-Ark would grant a waterline easement across Tract 10 to Tract 13. The Lee deed contained the easement across Tract 10. The Likens deed did not. Both Mid-Ark and the Likenses agree that the failure to include the easement

in the Likens deed was the result of a mutual mistake.

That same month, Mid-Ark paid the City of Dyer for a two-inch water line and meter hookups for the Lee and Likens properties. The meters were placed at the corner of Tract 7. Shortly thereafter, the Likenses and the Lees dug a single trench across Tract 10 and laid water lines to both properties.

In February 2002, Mid-Ark sold Tract 10 to David Henson, subject to all right of ways, easements, restrictions, and previous mineral reservations, if any. Henson conveyed the property to the Drays in September 2003. The Drays were unaware that the Likenses had a water line across their property until a neighbor accidentally dug it up.

On September 23, 2010, the Drays filed suit against the Likenses for a declaratory judgment denying that the Likenses had any legal right to the property, for trespass, and for removal of the Likenses' water lines from the property. The Likenses answered, denying the allegations and claiming that the action was malicious in nature and was intended as retribution for their denial of the Drays' request for an easement for an electric line across their property. The Likenses counterclaimed, alleging their entitlement to a prescriptive easement, an implied easement, or an easement by necessity. In the alternative, the Likenses requested reformation of their deed to include the easement originally intended by the parties.

A hearing was held on January 31, 2012. After hearing the testimony of the witnesses and reviewing the evidence submitted, the trial court ruled in favor of the Likenses' claims and defenses. The trial court granted the easement, finding that the Likenses had proved that

they were entitled to either an easement by implication or a prescriptive easement for the water line. The court further found that the Drays' property was not burdened by the existence of the Likenses' waterline because it was virtually indistinguishable from, and was simultaneously installed in the same trench with, the water line of a neighbor, who had a valid recorded easement. The Drays appeal this order.

The Drays argue that the trial court erred in awarding an easement because (1) they were bona fide purchasers for value without notice who recorded first thereby defeating a claim for reformation; (2) an underground pipe, by definition, cannot be open and notorious, thereby defeating a claim for a prescriptive easement; (3) the servitude was not established before unity of title was severed thereby defeating a claim for an easement by implication; and (4) the water line was not necessary to the enjoyment of the property thereby defeating a claim for an easement by necessity.

We review equity cases de novo on the record but will not reverse a finding of the trial court unless it is clearly erroneous. *Slaton v. Slaton*, 336 Ark. 211, 983 S.W.2d 951 (1999). A finding is clearly erroneous, when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Id.*

The Drays first argue that they were bona fide purchasers for value defeating a claim for reformation. A deed to property can be reformed even when the holder of record legal title resists it. Reformation is an equitable remedy that is available when the parties have reached a complete agreement but, through mutual mistake, the terms of their agreement are

not correctly reflected in the written instrument purporting to evidence the agreement. *Fayetteville Real Estate & Dev., LLC v. Norwood*, 2012 Ark. App. 456, ___ S.W.3d ___. A mutual mistake is one that is reciprocal and common to both parties, each alike laboring under the same misconception in respect to the terms of the written instrument. *Id.* A mutual mistake must be shown by clear and decisive evidence that, at the time the agreement was reduced to writing, both parties intended their written agreement to say one thing and, by mistake, it expressed something different. *Id.* Questions regarding the parties' intent are to be resolved by the trier of fact. *See Spann v. Lovett & Co.*, 2012 Ark. App. 107, ___ S.W.3d ___; *Stalter v. Gibson*, 2010 Ark. App. 801, at 5–6, 379 S.W.3d 710, 714. Through reformation, a court may correct the legal description of the property conveyed in a deed. *Stalter v. Painter*, 84 Ark. App. 114, 133 S.W.3d 425 (2003).

Reformation is not available if the remedy results in prejudice to a subsequent bona fide purchaser. *Id.* The reason behind such a rule is that, when a bona fide purchaser acquires an interest in land and makes an investment in the land, the party is entitled to have his expectations protected. *Id.* The elements required to establish one's status as a bona fide purchaser, so as to defeat reformation, are (1) a purchaser in good faith; (2) for valuable consideration, not by gift; (3) with no actual, constructive, or inquiry notice; (4) who would be prejudiced by reformation. *Fayetteville Real Estate & Dev., LLC, supra* (citing 66 Am. Jur. 2d *Reformation of Instruments* § 63 (2001)). This analysis focuses on the "factual circumstances relating to the events surrounding a transaction, that is, the realities disclosed by the evidence as distinguished from their legal effect." *Id.*

The evidence presented at the hearing clearly showed that the failure to include the easement on the Likenses' deed was the result of a mutual mistake. In fact, the Drays concede that, as between Mid-Ark and the Likenses, reformation was appropriate. The trial court found that the Drays would not be prejudiced by the establishment of an easement in favor of the Likenses. The court found that the Drays' property was already subject to a recorded easement by Kyu Shun Lee. It also found that there were two waterlines located in the subject easement; that the two lines were simultaneously installed in the same trench; and that the two lines were indistinguishable from one another. These findings were substantiated by the testimony of Kyu Shun Lee and Justin, Erin, and Danny Likens and were supported by the photographs of the waterlines admitted into evidence. We cannot conclude that the trial court committed clear error in finding that the Drays were not prejudiced by the granting of another easement and reformation of the deed. Because reformation was appropriate, we need not address the Drays' other arguments for reversal.

Affirmed.

PITTMAN and GRUBER, JJ., agree.

Hardin, Jesson & Terry, PLC, by: *Robert M. Honea*, for appellants.

Brister Law Firm, PLLC, by: *M. Sean Brister*, for appellees.