RENDERED: March 5, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 1997-CA-000423-MR

ORVEDA DUNN AND GEORGE DUNN — APPELLANTS

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 1993-CI-000273

MYRA F. POLLITT; RANDY E. POLLITT; AND THE CAMPBELL COUNTY BOARD OF EDUCATION — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
** ** ** ** **

BEFORE: EMBERTON, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: George Dunn and his wife, Orveda Dunn, appeal from a January 27, 1997, summary judgment and order of the Campbell Circuit Court granting an appurtenant passway easement across their land to the adjoining land of their neighbors, Myra and Randy Pollitt, the appellees. Provision for this easement does not appear in the Pollitts' deed to their property or in any deed in their chain of title. Instead, according to the trial court, the easement arises by necessary implication from the fact that the Pollitts have no other assured means of ingress and egress. The Dunns dispute this finding of fact, and contend that the

trial court erred both procedurally and substantively: procedurally by granting summary judgment despite the factual dispute and substantively by misapplying the law of easements. We agree with the Dunns on both scores. Accordingly, we reverse the summary judgment and remand for additional proceedings.

The Pollitts acquired their one-acre lot in early March 1993, and about one week later, filed the complaint against the Dunns from which this appeal has arisen. In addition to the easement across the Dunns' property, the Pollitts sought a reformation of their deed to amend an allegedly misstated boundary line. The parties eventually agreed to a modification of the description of the Pollitts' lot, and thus that aspect of the case plays no part in this appeal.

With respect to the easement, the controversy centers upon an abandoned county road. That road, formerly River Road near and in California, Campbell County, Kentucky, traversed land once owned by W.H. Young. In particular, the road traversed lot 18 of the W.H. Young estate which sometime prior to 1959 came into the possession of Clyde and Leola Young. Meanwhile, during the mid-1930's, the Commonwealth built State Highway 8 across Campbell County. The new state highway incorporated much of the old River Road, but in some places the two (2) roads diverged. One place where they diverged was the Youngs' lot 18, which consequently was crossed by both roads. Apparently as a result of the state improvements, the sections of River Road which were not incorporated into the new road were abandoned, with neither the state nor the county continuing to maintain them.

Nevertheless, on lot 18 and on adjacent land owned by the Campbell County Board of Education, the old road remained in use, although whether as a through way for the general public or merely as an access road for abutting property owners, the record does not make clear.

In 1959 Clyde and Leola Young conveyed to the Dunns a small portion of lot 18, bounded on the east and west by the two (2) roadways and on the north and south by the lot's boundary lines. The conveyance thus divided lot 18 into three (3) sections: a western section bounded on the east by the state highway, a center section bounded on the west by the state highway and on the east by the old county road, and an eastern section bounded on the west by the county road. The eastern section was otherwise landlocked. The Youngs gained access to it, apparently, by driving around the Dunns' parcel and by using a short driveway on the adjacent Board of Education's lot to reach the old county road.

In 1972, Clyde and Leola Young conveyed a portion of the easternmost section of lot 18 to Ronald and Mary Lou Young. This portion, designated as lot 18A, includes the county road as one of its boundaries. That road continued to serve as an access way for the new owners.

By 1993, when Ronald and Mary Lou Young conveyed lot 18A to the Pollitts, the Board of Education's property was occupied by the A.J. Jolly School, which had black-topped its portion of the old county road and expanded the driveway between the two (2) roads into a horseshoe shaped bus turn around. The

Pollitts' access to their property was by means of this school driveway and along the remains of the county road between their lot and that of the Dunns'.

Unhappy with having to cross the Board's property and unsure of their right to do so, the Pollitts filed their complaint seeking an easement across the Dunns' lot which would give them direct access to their property from Highway 8. They argued that this easement had been implicitly reserved in the 1959 transfer to the Dunns. That transfer, which had divided lot 18 into three (3) sections, had landlocked the easternmost section of lot 18 and thus lot 18A. Their lot was landlocked, they maintained, despite the continuing availability of the school's driveway and the abandoned county road, because that means of access was merely by sufferance of the Board and not by legal right. They were entitled to access, they insisted, that was not contingent upon their neighbor's good will.

By order entered October 12, 1998, the trial court agreed.[1] It assumed, apparently, that the abandonment of the old River Road had extinguished any and all rights to continue using it. The trial court thus deemed the old county road and the history of its use irrelevant to the assessment of the Pollitts' complaint and refused to entertain any evidence regarding that

[1]The Pollitts and the Board have both suggested that the Dunns' failure to appeal within thirty (30) days of this 1993 order rendered the summary judgment *res judicata*. Without determining when the summary judgment was first declared--a matter the record leaves in doubt--it suffices to note that under CR 54.02 that ruling did not become final and appealable until January 27, 1997, when the trial court entered judgment on the entire case. The Dunns' appeal, therefore, is timely.

road's status either formerly, at the time of the transfer to the Dunns, or at present. Relying on Hall v. Coffey, Ky. App., 715 S.W.2d 249 (1986), the Court held that the transfer to the Dunns had implicitly reserved an easement across their lot for the benefit of the eastern portion of lot 18, and that the Pollitts were entitled to assert that right to an easement.

The Dunns maintain that the trial court erred by refusing to let them prove that the old county road did before and does still provide *de jure* as well as *de facto* access to the Pollitts' land. This factual dispute, they contend, made summary judgment inappropriate. They also maintain that the trial court's refusal to consider such evidence bespeaks a misinterpretation of the law pertaining to easements.

We begin our discussion by reiterating the familiar rule that a summary judgment is appropriate only if the movant establishes both that there is no dispute concerning any material fact and that he or she is entitled to judgment as a matter of law. CR 56.03 Kentucky courts are expected to uphold our jury system by assessing motions for summary judgment from the point of view of the non-movant and by giving the non-movant the benefit of every reasonable doubt. Because such rulings involve no factual findings but only conclusions of law, this Court's review is *de novo*. Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., Ky., 807 S.W.2d 476 (1991).

The Dunns maintain that the trial court erred by concluding that the Pollitts had established the implication of an easement from necessity. We agree. As our highest Court

observed in Marrs v. Ratliff, 278 Ky. 164, 128 S.W.2d 604, 609 (1939),

> [a] way from necessity is an easement founded on an implied grant or reservation and is an application of the principle that wherever one party conveys property, he also conveys whatever is necessary to the beneficial use of that property, and retains whatever is necessary to the beneficial use of land he still possesses; but it must be a way of strict necessity; mere convenience will not do. [internal quotation marks and citations omitted].

The Pollitts' cause of action, therefore, required them to prove that they lacked a means of entering and leaving their property that is both legally secure and physically reasonable. Holbrook v. Taylor, Ky., 532 S.W.2d 763 (1976); Bob's Ready to Wear, Inc. v. Weaver, Ky. App., 569 S.W.2d 715 (1978). They were required to prove that the old county road, the means of accessing their lot since its formation in 1972, was either not legally secure or was for some other reason unsuitable. They asserted, and the trial court agreed, that it was not legally secure because the Commonwealth had abandoned this portion of the road in the 1930's, and by so doing had extinguished the general public's right to use it.

The Dunns point out, however, first, that the ceasing of governmental maintenance does not necessarily imply the closing of a public easement. *See* Sarver v. County of Allen, Ky., 582 S.W.2d 40 (1979) (discussing the complex relationship between government roads, established by appropriate procedures, and public roads, often established by use); Marrs v. Ratliff, *supra*. Second, they argue that, even if this portion of the old

county road ceased to be a public easement, a private easement for the benefit of the Pollitts' tract may have arisen in some other way, such as by prescription or estoppel. Holbrook v. Taylor, *supra.* Summary judgment is thus premature, they insist, because the record clearly raises a genuine issue concerning the Pollitts' right to cross the Board of Education's land on the old road.

The Pollitts had not sued the Board of Education, and when the Dunns' response implicated it, a question arose as to whether the Board was a necessary party. The Dunns insisted it was because a full determination of the Pollitts' rights would require a Board response. At first, the trial court agreed with the Dunns and ordered that the Board be added as a party. It later rescinded this order, however, and ruled that the Board could be joined by motion of either party, but that the Pollitts were not required to add the Board to their complaint. Eventually, the Pollitts did join the Board, but apparently only as a matter of strategy, for they had made abundantly clear their desire to use the Dunns' property instead of the Board's. Not surprisingly, therefore, even though they joined the Board, the Pollitts made no attempt to prove that they have a right to use the Board's land. When the Dunns did attempt to enter such proof, the evidence was excluded on the ground that the Dunns had failed to file their own pleading against the Board and had no standing to proceed under the Pollitts' pleading.

The trial court's reasons for deeming the Board a nonessential party do not appear in the record, but the School

Board's brief argues that because the Pollitts can not be forced to bring a claim against it and because the Dunns do not have standing to assert the Pollitts' interests, the court had no alternative but to dismiss the Board from the case. This reasoning misconceives the nature of the Pollitts' complaint.

As noted above, there is a presumption against encumbering property with easements not expressly provided for in deeds. The Pollitts bear the burden of proving the necessary implication of the easement they have asserted. Where, as here, the record includes evidence strongly suggesting the existence of an alternative easement, the plaintiffs' burden of proof requires them to show that the alternative does not exist. The Dunns, of course, have the right to prove that it does, not as an assertion of the Pollitts' rights, but as a denial of the duty asserted against them. Standing is not the question. Standing concerns a party's right to initiate an action, and to invoke the court's jurisdiction. Kraus v. Kentucky State Senate, Ky., 872 S.W.2d 433 (1994). The Dunns do not seek to initiate an action; they are obliged to respond to one.

The question, as correctly raised by the Dunns, is one of joinder: whether a determination of the Pollitts' rights vis-a-vis the Dunns can be fully adjudicated without joinder of the Board. Because resolution of the issue between the Pollitts and the Dunns will require a determination of the Pollitts' right to use the Board's land, and will thus require that the Board be given an opportunity to respond, the Board of Education is a necessary party to this action. CR 19.01. Board. of Educ. of

Fayette County v. Taulbee, Ky., 706 S.W.2d 827 (1986). The trial court erred by ruling otherwise.

It is apparent from what has already been said that the trial court also erred by granting summary judgment against the Dunns. The Dunns have raised a genuine issue of material fact concerning the existence of an alternative means of ingress to and egress from the Pollitts' lot. Unless this alternative is disproved, the asserted necessity of an easement across the Dunns' lot fails. Because the trial court deemed this possibility of an alternative easement irrelevant, a few words on the subject may be in order.

The trial court seems to have relied primarily upon Hall v. Coffey, Ky. App., 715 S.W.2d 249 (1986). In Hall, the defendant landowner, against whom an easement by necessary implication had been asserted, resisted the complaint by arguing that the easement's necessity had not been proved. It was true, the defendant conceded, that the plaintiff was landlocked. The easement had not been shown to be necessary, however, because one of the plaintiff's neighbors was his son who would permit the plaintiff to cross his land. The Court rejected this defense. The possibility of permissive arrangements with third parties, the Court held, was irrelevant to the question concerning the plaintiff's rights.

Based on Hall, the trial court apparently concluded that the Dunns could not rely for their defense on the possibility that the Pollitts might have permissive access across a third-party's land. Hall, however, does not apply here.

Unlike the defendant in Hall, the Dunns do not concede that the Pollitts are legally landlocked, and they do not assert merely that the Board of Education will permit the Pollitts to continue using the old county road to reach their lot. They assert, instead, that the Pollitts have a right to such use, a right arising either from a continuing public easement along the old county roadway or a private easement along the same course. The existence of such a right, which has yet to be determined, is decidedly relevant to the Pollitts' claim.

The difference between Hall and this case can be put into sharp relief, we believe, by noting the following observation from Bob's Ready to Wear v. Weaver, 569 S.W.2d at 718, another case cited by the trial court. The Court was addressing whether an easement should be implied from an alleged necessity and said,

> the use sought to be imposed upon the servient tract for the benefit of the dominant tract must have been initiated when both tracts were the property of a common owner. Once common ownership is established and the particular use is found to have been initiated prior to severance, the determination whether the creation of an easement was intended will depend upon a number of [other] factors. [Citations omitted].

In Hall, the use the plaintiff sought to impose on the servient tract had been initiated long prior to severance and with the defendant's full knowledge and acquiescence. Here, on the other hand, the Pollitts seek to impose a novel use on the Dunns' tract. If they can show that, at the time the Dunns' lot was severed from the rest of lot 18, the parties to that transaction

were, or should have been, aware of the need for that use, and if they can prove a genuine continuing need for that use, they may well be entitled to the easement they seek. Their burden of proof, however, extends to disproving the alternative which the record plainly suggests. The trial court erred by relieving them of that burden.

Accordingly, we affirm that portion of the January 21, 1997, judgment of Campbell Circuit Court which amends the boundary description of the Pollitts' tract, and we reverse that portion which grants the Pollitts an easement over property owned by the Dunns. The matter is hereby remanded to Campbell Circuit Court for additional proceedings consistent with this opinion.

ALL CONCUR.

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