RENDERED: December 29, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002292-MR

LAWRENCE BORNE — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 97-CI-00414

EDGAR BENNETT, JR. — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: JOHNSON, MILLER AND SCHRODER, JUDGES.

JOHNSON, JUDGE. Lawrence Borne has appealed from a judgment of the Franklin Circuit Court entered on September 3, 1999, in a declaration of rights action filed by appellee Edgar Bennett, Jr., as a result of an easement dispute. Having concluded that the judgment which permits Bennett, as owner of the dominant tenement, to modify an existing passway over the servient tenement, owned by Borne, so as to permit Bennett ingress and egress to his property by automobile is not erroneous, we affirm.

Bennett filed his petition for declaration of rights on March 12, 1997. A trial before the court was held on June 30, 1999. On September 3, 1999, the trial court entered a judgment

granting Bennett's petition to modify an existing passway over Borne's property. The trial court's findings of fact in the case are summarized below.

In March 1996, Bennett acquired a tract of land comprising approximately 77 acres in northern Franklin County near U.S. Highway 421 (Bennett tract). The Bennett tract adjoins a 198.49 acre tract, owned by Lawrence Borne (Borne tract). Borne acquired his tract, in partnership with his father, in February 1973. The Borne tract has frontage on U.S. Highway 421, while the Bennett tract has no frontage or direct access to any public road.

Each party's chain of title includes references to a "road or passway" which provides the Bennett tract with access from U.S. Highway 421 through the Borne tract. Since 1955, the deeds in the Bennett tract chain of title have contained a clause conveying "all right, title and interest in and to the road or passway, including the land used in connection therewith, leading from the premises hereinabove described to Highway 421." Since 1973, the deeds in the Borne tract chain of title, with one exception,[1] have contained the following reservation: "Said land is conveyed subject to all existing easements on and across the same appearing of record, and also the passway (which is not recorded) from US 421 to the lands of Newton Hoover."[2] The deeds

[1]The exception is the last deed in the chain of title from Borne's parents to Borne. Borne concedes that the omission of the passway in this deed was a mistake.

[2]Newton Hoover previously owned the Bennett tract.

do not describe the dimensions or the location of the passway or restrict its use.

The location of the existing passway is undisputed. It is a narrow, unpaved, ungraveled passage that runs from U.S. Highway 421 along the southern boundary of the Borne tract to Flat Creek. The passway enters Flat Creek, makes a 90 degree turn to the north (right) into the bed of Flat Creek where it runs approximately 100 feet, then it comes out of the creek bed to the southwest and up to the Bennett tract near a large walnut tree. In the past, use of the passway has been limited to farm equipment, logging equipment, and four-wheel drive vehicles. The passway is not adequate for automobile use, particularly in the creek bed. Flat Creek is a blue line stream in which there is often water, ice, or rough terrain.

There has not been a house on the Bennett tract since at least the 1930's; however, Bennett now desires to build a house on the tract to be used as his residence. He has already constructed a barn on his property.

Upon his acquisition of the property, Bennett approached Borne about conveying an easement to facilitate access to the Bennett tract through a new and improved route on the north end of the Borne tract (the north entrance). Borne agreed to the new route with certain stipulations as to Bennett's liability for construction and maintenance of the roadway and bridges. Bennett hired Robert Semones, a surveyor, to survey a route for improved access using the north entrance.

Subsequently, Bob Tillett of the State Highway

Department informed Bennett that the proposed new north entrance off U.S. Highway 421 did not meet Highway Department standards for sight distance, and that he would not recommend that a permit be issued. Bennett did not appeal the Highway Department's decision that the north entrance would not meet state sight distance requirements. According to the findings of the trial court, Bennett abandoned the proposed north entrance because 1) it would require him to construct an additional roadway around the edge of a steep hill for approximately one-fourth mile; 2) it would require him to construct a $20,000.00 bridge across Flat Creek, as compared with the $2,000.00 to $2,500.00 cost of the low-water crossing and pipe; 3) it would require him to fill a large low area between U.S. Highway 421 and Flat Creek; 4) it would require him to construct a road on the northern-most portion of the Borne Tract which is most susceptible to flooding; and 5) the proposed entrance would be unsafe as it would not meet Highway Department sight distance requirements.

Following the negative developments regarding the north entrance, Bennett proposed to improve the existing passway in order to facilitate ingress and egress by automobile. Bennett's proposed improvements to the passway would require a low-water crossing across Flat Creek and a large pipe or culvert in a second creek. It was stipulated by the parties that Bennett has obtained the necessary Highway Department permits and approvals for these proposed improvements.

Gary Poole, a civil engineer and drainage expert, testified for Bennett concerning the effect of the proposed low-

water crossing on the Borne Tract. His testimony was that there would be a minimal impact on the severity of flooding in a 100-year flood on Borne's large tobacco patch, which adjoins U.S. Highway 421. He testified that there are two primary sources of flooding to the Borne tract. The first is located to the south of the Borne tract on adjoining property, and the other is backwater created during heavy rains and originates at the point where Flat Creek and Goose Creek converge. Poole testified that the proposed passway improvements would have no effect on the existing flooding conditions, and this testimony was uncontroverted. Poole did not study the impact of the proposed north entrance versus the impact of the proposed improvements to the existing point of access at the south end of the large tobacco patch. He testified that the minimal increase in flooding from the low water crossing over Flat Creek would be to the south and west.

The parties' deeds do not state the width of the passway. Semones testified that the width of the existing passway where it crosses the Borne tract near the southern end of Borne's large tobacco patch ranges from 10 to 20 feet. Bennett seeks to expand the existing passway to 20 feet between U.S. Highway 421 and Flat Creek. Semones testified that a passway width of 20 feet was generally required by the planning and zoning ordinance for any minor subdivision plat where the property to be served by the easement has no road frontage. Bennett testified that he has no intention of subdividing the Bennett Tract.

The 20-foot proposed passway runs along a fence that divides the Borne tract from the adjoining property to the south. Semones testified that the distance from the fence to the edge of the plowed tobacco field varies from 23 to 26 feet, and Bennett testified that it is 29 feet from the fence to the nearest tobacco plant. The proposed easement does not touch the actual tobacco plants themselves, but does encroach on the plowed field. Furthermore, there was no proof that Borne would lose any marketable timber as the result of the new passway; however, construction of the low-water crossing may prohibit Borne from driving his tractor down the bed of Flat Creek to the south to access other portions of his property.

Borne first contends on appeal that the trial court erred as a matter of law "by expanding, altering, rerouting, enlarging, and modifying the nature of use and construction of the easement over the Borne tract." We disagree. "The owners of the easement and the servient estate have correlative rights and duties which neither may unreasonably exercise to the injury of the other."[3] "The use of an easement must be reasonable and as little burdensome to the landowner as the nature and purpose of the easement will permit. The nature and extent of an easement must be determined in light of its purposes."[4] "Easements may

[3]Commonwealth, Department of Fish & Wildlife Resources v. Garner, Ky., 896 S.W.2d 10, 13 (1995) (citing Higdon v. Kentucky Gas Transmission Corp., Ky., 448 S.W.2d 655 (1969)).

[4]Id. (citing Horky v. Kentucky Utilities Co., Ky., 336 S.W.2d 588 (1960); Farmer v. Kentucky Utilities Co., Ky., 642 S.W.2d 579 (1982); and Thomas v. Holmes, 306 Ky. 632, 208 S.W.2d 969 (1948)).

not be enlarged on or extended so as to increase the burden on or interfere with the servient estate."[5] "However, the owner cannot unreasonably interfere with the rights of the holder of the easement."[6]

The deeds to the Borne tract and the Bennett tract do not describe the location, dimensions, or restrictions regarding the use of the passway. "In such circumstances, reason and authority dictate that the rights obtained by the dominant owner are those necessary for the reasonable and proper enjoyment of the easement." "By parity of reasoning, the owner of the servient estate retains the right of full dominion and use of his land, except so far as a limitation of his right is essential to the fair enjoyment of the easement."[7]

"'Generally, the rule has been established that if an easement is granted or reserved in general terms which do not fix its location the owner of the servient estate has the right in the first instance to designate the location of the easement. The right, however, must be exercised in a reasonable manner with due regard to the rights of the owner of the dominant estate.'"[8]

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[5]Id. (citing City of Williamstown v. Ruby, Ky., 336 S.W.2d 544 (1960)).

[6]Id. (citing Ball v. Moore, 301 Ky. 779, 193 S.W.2d 425 (1946) and Smith v. Price, 312 Ky. 474, 227 S.W.2d 981 (1950)).

[7]Blair v. City of Pikeville, Ky., 384 S.W.2d 65, 67 (1964)(citing Maxwell v. McAtee, 9 B.Mon. (48 Ky.) 20; 28 C.J.S. Easements § 75; Horky v. Ky. Utilities Co., Ky., 336 S.W.2d 588; 17A Am.Jur., Easements, § 112; Vol. 3, Tiffany on Real Property, 3rd Ed., § 803).

[8]Id. (quoting Louisville & N. R. Co. v. Pierce, Ky., 254 S.W.2d 943 (1953)).

"Thus, [it] may be said that the rights and duties of the dominant and servient owner are correlative; neither may unreasonably exercise rights to the injury of the other."[9]

If the location of an easement is not selected by either the servient or the dominant owner and they cannot agree upon a location of the easement, a court of equity has the power affirmatively and specifically to determine the location of the servitude.[10] We review a trial court's adjudication of an easement issue under the abuse of discretion standard.[11]

The easement at issue in this case had been previously defined, and it is undisputed that the passway created pursuant to the easement is a narrow, unpaved, ungraveled passage suitable for farm equipment, logging equipment, and four-wheel drive vehicles, but not for use by an automobile. Bennett's major objective, it would appear, is to improve the passway so that it would be able to accommodate an automobile, apparently in anticipation of the future construction of a home on the Bennett tract.

A passway has never been established in regard to the easement at a location that is suitable for ingress and egress by automobile. The present passway follows a path that passes down a blue line stream; i.e., a stream of sufficient significance so as to be shown as a blue line on the topographic maps published

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[9]Id. (citing Central Ky. Natural Gas Co. v. Huls, Ky., 241 S.W.2d 986 (1951), and 28 A.L.R.2d 621).

[10]Potter v. Colvin, Ky., 303 S.W.2d 552, 553 (1957).

[11]Stewart v. Compton, Ky.App., 549 S.W.2d 832, 834 (1977).

by the United States Department of Interior Geological Survey. We agree with the trial court that the change in the passway that Bennett seeks is within the nature and scope of the easement as provided for in the deeds. The present passway does not permit Bennett to access his property by means of an automobile, and, consequently does not confer him with a right necessary for the reasonable and proper enjoyment of the easement.[12]

In summary, the findings of the trial court in support of its ruling were not clearly erroneous, and the trial court did not abuse its discretion in its determination that Bennett was entitled to a declaration of rights that he was entitled to improve the passway so as to permit him to have access to his property by automobile.

Next, Borne contends that the trial court was clearly erroneous in finding that he unreasonably attempted to restrict Bennett's access to the Bennett tract. In this regard, the trial court stated that

> the Court finds that Borne has unreasonably attempted to restrict Bennett's access to his property. The alternative means of ingress and egress to which Borne agreed, the north entrance, has been shown not only to be prohibitively expensive and burdensome, but also in all likelihood not even possible given the testimony of Mr. Tillett from the Highway Department.

[12]Blair, supra. See also Elam v. Elam Ky., 322 S.W.2d 703 (1959)(Court acknowledged the owners of dominant estate have right to make passway suitable for customary forms of transportation) and Newberry v. Hardin, Ky., 248 S.W.2d 427 (1952) (Court allowed change sought by dominant owner to make passway suitable for automobile use.)

"Findings 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."[13] Findings of fact are not clearly erroneous if supported by substantial evidence.[14] The test for substantiality of evidence is whether when taken alone, or in the light of all the evidence, it has sufficient probative value to induce conviction in the mind of a reasonable person.[15]

Borne was agreeable to the construction of a northern passway which would have permitted Bennett access to his tract by automobile; however, the record discloses that there were financial and regulatory impediments to that plan. Since Borne refused to comply with Bennett's request to upgrade the passway to a condition suitable for the passage of an automobile, we do not believe the trial court's finding that Borne unreasonably attempted to restrict Bennett's access to his tract was clearly erroneous.

Finally, Borne contends that Bennett failed to exhaust his administrative remedies and is therefore barred from asserting his rights in a court of equity. Specifically, Borne argues that Bennett's circuit court action is premature because he failed to appeal the denial by the Department of Highways of a permit for the opening of the northern entrance.

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[13]Kentucky Rules of Civil Procedure 52.01.

[14]See Black Motor Co. v. Greene, Ky., 385 S.W.2d 954 (1965).

[15]Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972); Janakakis-Kostun v. Janakakis, Ky.App., 6 S.W.3d 843, 852 (1999).

"The principle is well settled that a litigant will ordinarily be required to exhaust his administrative remedies before resorting to the courts for relief."[16] However, we agree with the trial court that Bennett was not required to pursue an administrative remedy before bringing this declaration of rights action, because he is seeking to make a determination as to property rights vis-a-vis himself and Borne, which is a circuit court matter. Bennett's declaration of rights lawsuit is entirely separate from the administrative proceedings regarding the northern entrance, and, further, does not involve an administrative agency decision.

For the foregoing reasons the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Bruce L. McClure Covington, KY	Earl S. Wilson, Jr. Lexington, KY

[16] Tharp v. Louisville & N.R. Co., 307 Ky. 322, 210 S.W.2d 954, 955 (1948).