RENDERED: November 2, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001984-MR

CHRISTINE FRENCH — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS MCDONALD, JUDGE
ACTION NO. 97-CI-004322

PAUL BRUCE AND
JUDY BRUCE — APPELLEES

OPINION
REVERSING
** ** ** ** **

BEFORE: BARBER, DYCHE AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Christine French ("French") appeals from an order of the Jefferson Circuit Court requiring her to remove concrete ornaments and shrubbery the front yard of her residence. For the reasons stated herein, we must reverse.

The facts are not in controversy. French owns a parcel of residential real property situated in Woodside Acres subdivision in Jefferson County, Kentucky. The adjoining parcel is owned by Paul Bruce and Judy Bruce (the "Bruces"). When facing the parcels from the street, the Bruces's driveway is on the right side of their property, with the right edge of their

driveway almost touching the Bruce/French property line. Prior to the institution of this action, French had erected a wooden fence which enclosed her yard.

On August 4, 1997, French filed the instant action against the Bruces in Jefferson Circuit Court alleging that they had violated their deed restrictions by building a room addition and garage which was finished with an unauthorized siding material, i.e., vinyl. She further alleged that the Bruces's driveway encroached onto her property, and that the encroachment placed a cloud on her title. Lastly, she maintained that the Bruces repeatedly drove their vehicle into the wooden fence described above. She sought removal of the driveway encroachment or compensation therefore; removal of the vinyl siding or damages for its use; and, compensation for damage to the fence.

On September 14, 1998, the Bruces filed a counterclaim. They alleged therein that the wooden fence referenced in French's complaint violated French's deed restriction prohibiting a fence from extending toward the front property line beyond the wall of the residence. They further alleged that the fence constituted a nuisance under Kentucky statutory law, and they sought a permanent injunction requiring French to remove the fence.

The matter was referred to mediation, without success. After the Bruces moved for summary judgment on French's claim, and French moved for summary judgment as to the Bruces's liability, the circuit court rendered an order on February 11, 2000, granting the Bruces's motion. As a basis for the order,

the court noted that the Bruces had removed the driveway encroachment and had repaired any damage to the fence. As for the alleged improper use of vinyl siding, the Bruces obtained a sufficient number of signatures from the subdivision homeowners necessary to amend the deed restrictions, thus rendering the issue moot.

The matter proceeded to a bench trial on the sole issue of whether French's fence violated the deed restrictions. Upon taking proof, the court rendered findings of fact and conclusions of law on February 17, 2000. It determined that the fence was both a violation of the deed restrictions and a private nuisance as defined by KRS 411.510 through 411.550. French was ordered to remove the fence within 45 days of the date of judgment.

Thereafter, French removed the fence. She then installed a row of plants and concrete ornaments along the edge of her property next to the property line. The row consists of small shrubs interspaced between concrete planters and concrete pineapples. The plants and concrete items were spaced approximately 24" apart, center to center[1], and do not encroach on the Bruces's property.

On March 15, 2000, the Bruces moved to have the row of plants and concrete items removed. They argued that the row was a "defacto fence", and further that it continued to be a nuisance because it interfered with the Bruces getting out of

[1]We have estimated the spacing based on defendant's exhibit 3. That exhibit consists of a photograph of a yardstick next to the row of plants and concrete items.

their vehicles. As such, they argued that the row was violative of the court's prior order to remove the fence.

A hearing on the matter was conducted. After taking proof on the motion, including the submission of photographs, the circuit court found that the row " . . . not only resembles, but constitutes a structure on par with a fence and it is in direct contravention not only of the Deed of Restrictions but in contravention of the Court's order requiring its removal." It went on to find that the row was a nuisance because it interfered with the Bruces exiting their vehicles. It ordered French to remove the row within 14 days. This appeal followed.

French now argues that the circuit court committed reversible error in ordering her to remove the shrubs and concrete items. She maintains that the plantings do not constitute fence, nor a private nuisance as defined in KRS 411.550. She seeks a reversal of the court's August 16, 2000, order.

Having closely examined the record, the law, and the arguments of counsel, we find French's argument persuasive and must reverse the order on appeal. The deed restriction at issue states as follows: "8. No fences of any nature may be extended toward the front of the property line beyond the front wall of the residence; . . . ." Clearly, the primary question now before us is whether the circuit court properly concluded that the row of shrubbery and concrete ornaments constitutes a "fence . . . of any nature" for purposes of application of the deed

restriction. We must conclude that the circuit court erred in finding that it does.

As a general rule, writings should be enforced according to the plain meaning of the words they contain. See generally, Bennett v. Consolidated Realty Company, Ky., 11 S.W.2d 910 (1928). This rule of construction is applicable to a variety of writings including constitutions, Todd v. Dunlap, Ky., 36 S.W. 541 (1986), statutes, Camera Center, Inc. v. Revenue Cabinet, Ky., 34 S.W.3d 39 (2000), and, as in the matter at bar, deed restrictions, Bennett, supra. In Bennett, the Court, citing other authority, stated that, "[I]t is a general rule that where the words of any written instrument are free from ambiguity in themselves . . . such instrument is always to be construed according to the strict, plain, common meaning of the words themselves . . . ." Bennett, 11 S.W.2d at 911. It went on to state that, "[I]n short, the words of an instrument, unambiguous in themselves, cannot be controlled by proof that the parties used them with a definite and limited meaning, for the purpose of that particular instrument." Id.

According to Bennett, then, the "strict, plain, common meaning" of the language at issue is controlling. The parties have offered various definitions of what constitutes a fence. These definitions, which are set forth in the record, are of some probative value. In them, the word "fence" is defined in a number of ways, such as "an enclosing structure or barrier" or a "structure, or partition, erected for the purpose of enclosing a piece of land." Having closely studied these definitions,

including the supportive case law cited by both French and the Bruces, we cannot conclude that the circuit court's finding on the issue at bar is supported by evidence of probative value. Ultimately, it is our conclusion that a person of reasonable sensibilities, upon viewing the shrubs and concrete ornaments, would not describe them as a fence.

The Woodside Acres developers could have, had they so desired, included specific language relating to shrubs, hedges, or other structures. For example, a California developer limited plantings with the following deed restriction: "No hedge or hedgerow, or wall or fence or other structure shall be planted, erected, located or maintained upon any lot in such location or in such height as to unreasonably obstruct the view from any other lot or lots on said Tract." See, White v. Dorfman, 116 Cal. App. 3d 892 (1981). While every contingency cannot be anticipated, broad and inclusive language in the deed restriction at issue could have limited or barred French's plantings. It is more likely, though, that the Woodside Acres developers simply wished to limit only fences and not shrubs or concrete ornaments, since this is what the express language of the deed restrictions so states.

We must give great deference to conclusions of the factfinder on questions of fact if the conclusions are supported by substantial evidence. Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116 (1991). On questions of law, or mixed questions of law and fact, we have greater latitude to determine

if the findings are supported by evidence of probative value. Id. The issue at bar is a mixed question of law and fact. Having found that there is no evidence of probative value supportive of the conclusion that French's shrubbery and concrete ornaments constitute a fence, we must reverse on this issue.

French also argues that the circuit court erred in ruling that her plantings constitute a private nuisance. She maintains that KRS 411.550, which defines a public nuisance, is inapplicable since there must be a physical invasion or touching of the plaintiff's property. As such, she seeks to have reversal on this issue.

KRS 411.550 states:

> (1) In determining whether a defendant's use of property constitutes a private nuisance, the judge or jury, whichever is the trier of fact, shall consider all relevant facts and circumstances including the following:
>
> (a) The lawful nature of the defendant's use of the property;
>
> (b) The manner in which the defendant has used the property;
>
> (c) The importance of the defendant's use of the property to the community;
>
> (d) The influence of the defendant's use of property to the growth and prosperity of the community;
>
> (e) The kind, volume, and duration of the annoyance or interference with the use and enjoyment of claimant's property caused by the defendant's use of property;
>
> (f) The respective situations of the defendant and claimant; and
>
> (g) The character of the area in which the defendant's property is located, including,

> but not limited to, all applicable statutes, laws, or regulations.
>
> (2) A defendant's use of property shall be considered as a substantial annoyance or interference with the use and enjoyment of a claimant's property if it would substantially annoy or interfere with the use and enjoyment of property by a person of ordinary health and normal sensitivities.

French argues, and the Bruces attempt to rebut, the notion that a private nuisance generally requires some sort of physical touching. The case law, though, primarily centers on the whether the source of the complaint is, in the language of KRS 411.550, a "substantial annoyance or interference". Examples of such annoyance or interference include the odor of a chicken farm, Valley Poultry Farms, Inc. v. Preece, Ky., 406 S.W.2d 413 (1966), the noise of jet aircraft, Louisville & Jefferson County Air Board v. Porter, Ky., 397 S.W.2d 146 (1965), or contamination of the plaintiff's land with polychlorinated biphenyls (PCBs), Fletcher v. Tenneco, Inc., 816 F. Supp. 1186 (E.D. Ky. 1993).

Again, while we are reluctant to tamper with the circuit court's rulings, we cannot conclude that the presence of shrubbery and concrete ornaments in French's yard meets the statutory or common law definition of a private or public nuisance. Unlike the odor of chickens, the sound of jet aircraft, or the contamination of a plaintiff's land with PCBs, French's shrubbery never leave her property. To the contrary, if the Bruces stumble over French's shrubbery, it is because they have stepped into her yard. They may avoid the aggravation by remaining on their property. Our research has uncovered no

other statutory or common law nuisance, public or private, which may be similarly avoided.

We conclude that the lower court improperly found French's shrubbery and concrete ornaments to be a private nuisance. As such, we must reverse on this issue.

For the foregoing reasons, we reverse the order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steven A. Snow
Louisville, KY

BRIEF FOR APPELLEE:

Dennis H. Shaw
David A. Black
Middletown KY