

RENDERED: JUNE 27, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000356-MR

ROBERT L. ROBBINS,
ADMINISTRATOR OF THE ESTATE OF
JOHN C. ROBBINS, DECEASED

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 03-CI-00136

BROOKS IMPROVEMENT CLUB, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE AND LAMBERT, JUDGES; BUCKINGHAM,¹ SENIOR
JUDGE.

¹ Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

MOORE, JUDGE: Robert Robbins² (R. Robbins) appeals from a Bullitt Circuit Court judgment quieting title in favor of the Brooks Improvement Club Incorporated (the Club) and enjoining the use of a driveway located on property owned by the Club. Because the trial court failed to address R. Robbins' claim that the use of the driveway established an easement by prescription, and because R. Robbins failed to move the trial court for additional findings of fact, this issue is not properly before us. Thus, we affirm the judgment of the trial court.

J. Robbins owned property adjacent to the Club's property and made use of a driveway across the Club's property to access his land, believing he had a perpetual easement to do so. He also used the driveway to bring construction equipment onto his land in preparation for building a residence. While using the driveway, it is undisputed that construction vehicles caused damage to the Club's property, specifically damage to some concrete basketball courts. In response, the Club filed the original action in Bullitt Circuit Court seeking damages for the damage caused to its property³ and to quiet title questioning the validity of J. Robbins' easement.

Before the trial court, R. Robbins put forth three arguments in support of the easement across the Club's property. He argued that he had an express easement; that his use of the driveway and the use of his predecessors in title

² John C. Robbins (J. Robbins) was the original defendant in this matter; however, he died during the proceedings. R. Robbins was appointed as Executor of the Estate of J. Robbins and was substituted as the defendant.

³ The trial court found the cost to repair the damaged basketball courts to be \$5,200 and ordered the Estate of J. Robbins to pay that amount to the Club. This is not disputed on appeal.

constituted an easement by prescription;⁴ and finally, that the property is landlocked because the only route used to access the property is the driveway easement which would support the grant of an easement by necessity.⁵

The case was submitted to the circuit court for a decision by the agreement of the parties. The Club introduced the testimony of Charles E. Kneisler, and R. Robbins' testimony was introduced on behalf of the Estate of J. Robbins.⁶

After the parties submitted their briefs,⁷ the circuit court decided that there was not an express easement. On appeal, R. Robbins does not dispute this finding.

In its findings of fact and conclusions of law, the trial court also addressed the claim of an easement by necessity, finding the elements were not met for an easement by necessity. Additionally, the court determined R. Robbins

⁴ A prescriptive easement can be acquired by possession which meets the following five criteria: actual, hostile, open and notorious, exclusive, and continuous for the statutory period of fifteen years. *Columbia Gas Transmission Corp. v. Consol of Kentucky Inc.*, 15 S.W.3d 727, 730 (Ky. 2000).

⁵ The three elements for the creation of an easement by necessity are (1) unity of ownership of the dominant and servient estates; (2) severance of the unity of title by a conveyance of one of the tracts; and (3) necessity of the use of the servient estate at the time of the division and ownership to provide access to the dominant estate. *Carrol v. Meredith* 59 S.W.3d 484, 491 (Ky. App. 2001).

⁶ If the testimony of these individuals was taken under oath before the court, neither a video nor audio tape was designated in the record submitted to this Court, nor were any affidavits, depositions, or other evidence designated before this court. Only the deposition of J. Robbins was designated in the record on appeal.

⁷ The court ordered the parties to file a joint memorandum. Despite this, the parties filed separate memoranda.

failed to show that the property was not accessible from other adjoining landowners. R. Robbins does not contend that the trial court ruled incorrectly on the lack of easement by necessity.

The trial court, however, failed to address R. Robbins' claim that the use of the driveway was sufficient to establish an easement by prescription. This failure is the sole basis of R. Robbins' appeal.

According to CR 52.04, a final judgment shall not be reversed or remanded because of the trial court's failure to make a finding of fact on an essential issue unless a motion requesting the court to make such a finding of fact is made before the trial court. That is, a "motion for additional findings of fact is required when the trial court has failed to make findings on essential issues and failure to bring such an omission to the attention of the trial court by means of a written request will be fatal to an appeal." *Vinson v. Sorrell*, 136 S.W.3d 465, 471 (Ky. 2004). In his submissions before the trial court, R. Robbins argued that his use and the use of the previous owners and occupants of the property constituted use sufficient to support the grant of an easement by prescription. However, when the trial court failed to rule specifically on the issue of an easement by prescription, R. Robbins did not file a post-trial motion for additional findings of fact regarding this issue. Rather, he filed this appeal claiming it was error for the trial court not to address this issue. Consequently, pursuant to CR 52.04, the issue of whether there is an easement by prescription is not properly before this court.

Due to R. Robbins' failure to move for additional findings of fact pursuant to CR 52.04, his sole issue on appeal is not properly before this Court. Thus, we affirm the judgment of the circuit court.

ALL CONCUR.

BRIEF FOR APPELLANT:

John W. Wooldridge
Shepherdsville, Kentucky

BRIEF FOR APPELLEE:

Anne W. McAfee
Shepherdsville, Kentucky