

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000671-MR

JOHN SAWYERS AND ELIZABETH SAWYERS

APPELLANTS

v. APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE JANET J. CROCKER, JUDGE
ACTION NO. 07-CI-00108

ARTHUR BELLER AND JOYCE BELLER

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, NICKELL AND THOMPSON, JUDGES.

NICKELL, JUDGE: John Sawyers and Elizabeth Sawyers appeal from a judgment concerning their right of way to two easements over the property of Arthur Beller and Joyce Beller. The Sawyers argue the trial court erred by: (1) granting a directed verdict in favor of the Bellers in violation of CR¹ 41.02 and without a

¹ Kentucky Rules of Civil Procedure.

factual basis; (2) restricting the use of their easement; and (3) concluding they were not entitled to damages. After reviewing the record and briefs, we affirm.

The Sawyers and Bellers are adjoining landowners in Allen County, Kentucky. This dispute centers on the Sawyers' right, as successors-in-interest, to access the easements over the Bellers' property. The easements were known as Fishback Passway and Lynn Passway. The case was tried before the court without a jury. At the close of the Sawyers' case, the court granted a directed verdict in favor of the Bellers with respect to the Lynn Passway. The court ultimately entered findings of fact, conclusions of law, and judgment stating the Sawyers had established the right to access the Fishback Passway by express easement, but the court restricted them from paving or materially changing the current condition of the roadway. The court further stated the Sawyers had failed to establish any right to the Lynn Passway and concluded they were not entitled to damages from stumpage in the Fishback Passway. The Sawyers filed a motion to alter, amend, or vacate the judgment, which the trial court denied. This appeal followed.

The Sawyers first argue the trial court erred by granting a directed verdict in favor of the Bellers in violation of CR 41.02 and without a factual basis.

CR 41.02(2) states:

In an action tried by the court without a jury, after the plaintiff has completed the presentation of the evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law

the plaintiff has shown no right to relief. The court as trier of facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52.01.

While the trial court may have used imprecise terminology by referring to its judgment as a directed verdict, we discern no violation of CR 41.02(2). The trial court made oral findings of fact and conclusions of law, which were then set forth in its written judgment. The Sawyers did not file a motion for additional findings. In its written judgment, the trial court termed its ruling regarding the Lynn Passway a “dismissal.” Moreover, the Sawyers have not specifically cited to any evidence in the record justifying reversal on this issue.

Next, the Sawyers argue the trial court erred by prohibiting them from enlarging or improving the Fishback Passway beyond its current condition and prohibiting them from using the easement for commercial purposes.²

Generally, an easement cannot be enlarged or extended so as to increase the burden upon or to interfere with the servient estate. It is true that sometimes additional use and reasonable deviation may be permitted the grantee when there has been a normal development of the use of the dominant estate.

City of Williamstown v. Ruby, 336 S.W.2d 544, 547 (Ky. 1960) (citations omitted).

Further Kentucky precedent holds that the mere construction of gates by the

² The record is not entirely clear as to what commercial purpose was proposed. Mention was made of a hunting preserve, although the Sawyers state in their brief at page 14 that they assert the right to any reasonable commercial activity on the property.

servient estate does not violate the dominant estate owner's easement rights.

Herndon v. McKinley, 586 S.W.2d 294 (Ky. App. 1979).

The Sawyers argue the trial court has effectively narrowed their easement because of a twelve foot gate that is narrower than its sixteen foot wide easement. We find no such language in the judgment. The trial court simply stated the Sawyers could not expand the width of the easement. The trial court found modern vehicles and equipment could negotiate the current dimensions of the easement and we are cited to no evidence of record showing otherwise. The Sawyers also argue the trial court erred by restricting them from graveling or paving the easement, but there is evidence the easement is passable in its current condition. We are pointed to no evidence of record demonstrating that graveling or paving the easement is necessary for the Sawyers to reasonably enjoy the easement. Finally, since there is no evidence in the record that the easement was ever used or intended to be used for commercial purposes, we hold no error in the trial court's prohibition of the commercial use of the easement.

The Sawyers next argue the trial court erred by finding they were not entitled to damages for the obstruction of their access to the Fishback Passway. "The measure of damages for obstruction of a passway is the diminution in value of the use of the property during the time the obstruction continued." *Wells v. Sanor*, 151 S.W.3d 819, 825 (Ky. App. 2004) (quoting *Wheeler v. Tackett*, 339 S.W.2d 646, 649 (Ky. 1960)). The Sawyers cite no evidence of damages in the record aside from their litigation costs, which are not a measure of damages for

obstruction of a passway. Nevertheless, citing *Middle States Coal Co. v. Hicks*, 608 S.W.2d 56 (Ky. App. 1980), and *Ky. Mountain Coal Co. v. Hacker*, 412 S.W.2d 581 (Ky. 1967), the Sawyers argue they are entitled to at least nominal damages.

The authority cited by the Sawyers is inapplicable to the present case because both cases dealt with trespass to land and not the obstruction of an easement by the servient estate. As stated above, the Sawyers admittedly offered no evidence as to the measure of damages for obstructing the passway. Therefore, the trial court did not err by failing to award damages.

Accordingly, the judgment of the Allen Circuit Court is affirmed.

CLAYTON, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent.

Though the trial court's judgment concludes that the plaintiffs have the right to enter upon the easement and maintain it in a passable condition, the court's judgment further states that the easement does not encompass any right to pave or gravel the roadway. It is my belief that an easement holder may make any use of the easement including maintenance and improvement that is reasonably necessary for the enjoyment of the easement and which does not cause unreasonable damage to the servient estate or will reasonably interfere with the enjoyment of the servient estate. *U.S. v. Hajduk*, 396 F.Supp.2d 1216 (D. Colo. 2005). *Bedke v. Ticket*

Ranch and Sheep Co., 137 P.3d 423 (Idaho 2006). *Walker v. Boozer*, 95 P.3d 69 (Idaho 2004). *Nodine McNerney*, 833 N.E.2d 57 (Ind. App. 2005). *Restatement (Third) of Property, Servitudes* § 4.13. *Restatement (First) of Property* § 485.

Applying gravel to a roadway easement is a reasonable and permissible maintenance of the easement. *Vander Heide v. Boke Ranch, Inc.*, 736 N.W.2d 824 (S.D. 2007). An easement for ingress and egress is a straight forward concept that encompasses surface use and whatever improvements in maintenance to the roadway that are necessary to permit continued travel. *Kennedy v. Anderson*, 881 So.2d 340 (Miss. App. 2004).

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