

RENDERED: AUGUST 20, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001532-MR

AUDREY CUNNINGHAM AND  
PAUL CUNNINGHAM

APPELLANTS

v. APPEAL FROM LEWIS CIRCUIT COURT  
HONORABLE ROBERT B. CONLEY, JUDGE  
ACTION NO. 09-CI-00006

RICK SWEARINGEN; DEBRA N.  
SWEARINGEN; ROBERT  
HEDDLESTON, JR.; AND  
RUTH ANN HEDDLESTON

APPELLEES

OPINION  
VACATING AND REMANDING

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BEFORE: NICKELL AND STUMBO, JUDGES; WHITE,<sup>1</sup> SENIOR JUDGE.

WHITE, SENIOR JUDGE: Audrey Cunningham and Paul Cunningham appeal

from a summary judgment of the Lewis Circuit Court, which ruled in favor of Rick

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<sup>1</sup> Senior Judge Edwin M. White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Swearingen, Debra Swearingen, Robert Heddleston and Ruth Ann Heddleston in a dispute involving the location of an easement. After our review, we vacate the order granting summary judgment and remand for further proceedings.

In April 2006, Rick Swearingen and Debra N. Swearingen purchased a tract of approximately 132 acres from Robert Heddleston and Ruth Ann Heddleston. The Heddlestons had owned the property, which is located in Lewis County, Kentucky, since 1969. The tract is landlocked and is bordered on the north by property belonging to Audrey and Paul Cunningham. The deed of conveyance from the Heddlestons to the Swearingens provided for an easement across the Cunninghams' property to a nearby highway. The alleged easement was created in 1944 by W.D. Swearingen (apparently no relation to the appellees). The deed of conveyance from the Heddlestons to the Swearingens stated in pertinent part as follows:

THERE IS INCLUDED HEREIN as a part of the consideration herefore, a right of way that was reserved by W.D. Swearingen in a deed dated January 15, 1944, recorded in Deed Book 67, page 623, traversing lands previously owned by W.D. Swearingen, which right of way serves the premises described above and has carried through to the present and describes as follows:

The passway now existing and established running from the State Highway #10 (now Highway 9, AA Highway), and across the property Above described (now owned by Audrey Cunningham and Paul Cunningham, her husband, in Deed Book 146, page 191, and Deed Book 147, page 363, Lewis County Court Records) and for the use of the owners of

property lying behind said land (reference to the premises conveyed herein).

After the Swearingens purchased the property, the Cunninghams refused to allow them access to the purported easement.

The Swearingens filed a complaint against the Cunninghams and the Heddlestons in the Lewis Circuit Court. The complaint sought a declaration relating to the existence of the express easement contained in the Swearingen deed or, in the alternative, to enforce the general warranty provision in the deed against the Heddlestons. In their answer, the Cunninghams denied the existence of the easement across their property. The Heddlestons filed an answer, crossclaim and counterclaim, alleging that the Swearingens were in default in payment of a note secured by a purchase money security interest in the property, admitting that they had provided a general warranty of title which might include a warranty of access, and stating that the Swearingens were indeed provided access to the Cunningham property by virtue of the deed. The Heddlestons also stated that during their ownership of the property from 1969 through 2006, they had utilized the reserved passway to access their property.

The Heddlestons made a motion for summary judgment and/or judgment on the pleadings on March 9, 2009. The Cunninghams filed a brief response objecting to the motion, stating that the public record on which the plaintiffs relied failed to establish any of their alleged rights, and that any alleged

rights were based solely on a “self-serving” deed prepared by the Swearingens and the Heddlestons.

On March 23, 2009, the trial court entered an order setting a trial date and ordering the parties to mediation. The mediation was unsuccessful. On June 15, 2009, the Cunninghams filed their response to the plaintiffs’ discovery requests. The Cunninghams also served interrogatories and requests for production of documents on the Swearingens. Rick Swearingen then filed a motion for summary judgment which relied on the previously filed motion of the Heddlestons, requesting the court to decide whether an express easement existed or not. The Cunninghams responded, arguing that a motion for summary judgment was inappropriate because the alleged easement was not admitted and was a matter of proof. The Heddlestons filed answers to the Cunninghams’ discovery requests. On July 18, 2009, the circuit court entered an order giving the Cunninghams until July 24, 2009, to file a response to the motion for summary judgment, and the Swearingens and Heddlestons until August 3, 2009, to file a reply. The court stated that once the reply was filed, the court would take the matter under submission for a decision on the motion for summary judgment. The Cunninghams thereafter filed supplemental responses to the plaintiffs’ discovery requests, including affidavits from Audrey Cunningham, Jeff Cunningham, Donald L. Wood, and a surveyor’s report from James H. Pollite.

The Swearingens and Heddlestons filed a joint reply to the Cunningham's supplemental responses, arguing that the responses bolstered their arguments that the case was ripe for summary judgment.

The trial court entered summary judgment in favor of the Swearingens and Heddlestons on August 12, 2009. The trial court ruled that there was no genuine issue of fact and that the deeds fully supported the proposition that an express deeded reservation of easement created in 1944 existed over the Cunninghams' property for the benefit of the Swearingens' tract. This appeal followed.

The Cunninghams make two arguments on appeal: first, that the evidence indicates that there is no easement or passway across their property benefitting the property of the Swearingens; and second, that the trial court committed a procedural error in granting summary judgment without specific findings after it had earlier denied such a motion.

“The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). “The standard of review on appeal of a summary judgment is whether the circuit judge correctly

found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law.” *Pearson ex rel. Trent v. Nat’l Feeding Sys., Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Scifres*, 916 S.W.2d at 781.

“An easement may be created by express written grant, implication, prescription or estoppel.” *Loid v. Kell*, 844 S.W.2d 428, 429-430 (Ky. App. 1992). None of the parties deny that W.D. Swearingen created an easement by express written grant in 1944; their dispute concerns the location of that easement. In 1944, W.D. Swearingen owned what is now the Swearingen property and also the westernmost half of what is now the Cunningham property. The easternmost half of the Cunningham property was owned at that time by the Moores. In 1944, W.D. Swearingen conveyed the westernmost half (a parcel of approximately 54 acres), to Audrey Cunningham’s parents, Elmer and Ethel Kennedy, from whom it eventually passed to Audrey Cunningham. The deed states that

It is understood that this conveyance is subject to the reservation of the passway now existing and established running from state highway 10 over and across the property . . . for use of the owners of property lying behind said land.

The parties disagree as to what is meant by the “property lying behind said land.” The Swearingens and Heddlestons contend that W.D. Swearingen, who in 1944 was the common owner of what is now the Swearingen property and the westernmost half of the Cunningham property, created the easement to benefit the

parcel which he retained, which would otherwise have been landlocked. They contend that the passway is located on the westernmost portion of the Cunningham property, which has access to the highway.

The Cunninghams, on the other hand, argue that the easement was created to benefit what is now the easternmost parcel of their property, which in 1944 was owned by the Moores. The Moores conveyed the easternmost tract to the Staggses in 1945, who in turn conveyed it to the Kennedys in 1947. By 1947, then, the Kennedys owned both tracts bordering the Swearingen property on the north. The Cunninghams argue that the easement was created to provide access to the road for the easternmost one of these tracts. When the Kennedys acquired both tracts, the easement was effectively extinguished under the doctrine of merger. “[T]he reason one may not have an easement in his own land is that an easement merges with the title, and while both are under the same ownership the easement does not constitute a separate estate.” *Sievers v. Flynn*, 305 Ky. 325, 204 S.W.2d 364, 366 (1947).

The language of the 1944 deed is ambiguous, in that it does not specify which tract of property benefits from the easement. In such a situation, extrinsic evidence may be admitted to interpret the deed. *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000) (“Extrinsic evidence cannot be admitted to vary the terms of a written instrument in the absence of an ambiguous deed.”). The question then becomes whether the other deeds in the record conclusively show, as the appellees contend, that the easement benefits the Swearingen property, or

whether it was created for the benefit of the eastern portion of the Cunningham property and essentially became unnecessary in 1947 when Audrey Cunningham's parents acquired the easternmost tract.

In granting the motion for summary judgment, the trial court referred to Audrey Cunningham's assertion that the easement serving the easternmost portion of her property was created by her predecessors in title in a deed recorded in Deed Book 72, page 607. The trial court observed that, "while there is an easement set out in regards to that tract [the easternmost tract] it does not appear in the chain of title for that tract until June of 1945, while the easement in question in this action as it regards the Swearingens' property was created in January of 1944."

The deed recorded in Deed Book 72, page 607, was referred to by the Cunninghams in their answer to the Heddlestons' cross-claim, in which they stated that the easternmost tract of their property was obtained by their predecessors in title by deed from Harry O. Staggs in 1947. The June 1945 deed, in which the Moores conveyed the property to Staggs, is not in the record, but the Cunninghams' expert, James H. Pollite, observed that the 1945 Moore to Staggs deed provided the "right to passway from said property to State Highway No. 10[.]" Pollite speculated that this right to passway may have been obtained through the deed from Swearingen to Kennedy in 1944. The trial court concluded that the easement contained in the Moores/Staggs/Kennedy chain of title was different from the one created by W.D. Swearingen in 1944 since it did not appear in the chain of title until one year later. But Swearingen could have created the



easement, which would not have been recorded in the Moore chain of title until they sold the property to the Staggses.

It is also significant that the easement is not mentioned in the 1969 deed of conveyance from Talbert and Jewell Ginn, the Heddlestons' predecessors in title. In the opinion of the Cunninghams' expert, James H. Pollite, this omission was due to two things: that the Heddlestons owned property to the west through which access to the highway existed and they had no need for the easement, and that the passway mentioned in the 1944 deed was always for the benefit of the easternmost Cunningham parcel. Although the trial court reasoned that "to accept the position of the Cunninghams would render the property in question landlocked[,]” it is unclear whether W.D. Swearingen, like the Heddlestons, and possibly the Ginns, also had access to the highway from some other point.

Although it may be unlikely that W.D. Swearingen created an easement to benefit the tract belonging to the Moores, genuine issues of material fact remain in this case because the deeds and other evidence provided in the record are simply not dispositive as to the location of the easement. "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact."

*Steelvest*, 807 S.W.2d at 480.

We therefore vacate the order of the Lewis Circuit Court granting summary judgment to the appellees, and remand for further proceedings in accordance with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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