RENDERED: APRIL 13, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001653-MR

JESSE J. BOWENS
AND ANNA M. BOWENS APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 09-CI-01111

DONALD MCCOY
AND KATHY MCCOY APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Jesse and Anna Bowens (Appellants) appeal from a summary judgment entered by the Pike Circuit Court in favor of Donald and

[1] Senior Judge Joseph E. Lambert 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.

Kathy McCoy (Appellees) in a property-dispute action between the parties. At issue is whether a prior judgment of the circuit court in another action required a different decision herein under the law-of-the-case doctrine. Because Appellants present no arguments that would merit a different result, we affirm.

The pertinent facts are not in dispute. In 2004, Appellees filed suit against Appellants' predecessors-in-title, Douglas and Linda Hatfield, to resolve a boundary dispute. Appellees and the Hatfields owned adjacent properties. The only access to Appellees' property was a driveway that ran along the boundary line separating the properties. The Hatfields claimed that a portion of Appellees' driveway actually ran through their property. Appellees disputed this claim but also argued that if it turned out to be true, they were effectively landlocked since they could not access their property without using the driveway.[2]

At trial, the Hatfields conceded via testimony and affirmations made by their counsel that if they won the boundary dispute, they would not contest Appellees' right to an easement allowing them access to their property. On November 28, 2005, the circuit court entered a judgment in favor of the Hatfields, finding that their claimed boundary line was most consistent with the evidence. Of particular relevance to the current case, the judgment then provided: "The Plaintiffs (McCoys) are permanently enjoined from interfering with the Defendants' (Hatfields') use of their real property, and the Defendants may

[2] The parties do not dispute that this driveway was, in fact, the only access to Appellees' property.

permanently establish the lines identified by Luke Hatfield, Engineer, with permanent markers on the ground." The judgment stated nothing explicit about the easement issue and no subsequent effort was made to clarify the matter before Appellees filed an appeal from the decision.

On appeal, this Court affirmed the decision of the circuit court in an unpublished opinion. Of particular note, this Court held as follows:

> The McCoys additionally disagreed with the finding of the trial court enjoining them from interfering with the Hatfield's [sic] use of their real property. *They sought a declaration of an easement across a portion of the disputed area. The trial court refused to specifically grant that easement. It is clear from the trial court's order that the McCoys do not enjoy any rights to the property owned by the Hatfields as defined by the boundary line established by the surveyor.* We find nothing in our review of the record to cause us to substitute our judgment for that of the trial court.

McCoy v. Hatfield, No. 2006-CA-000308-MR, 2007 WL 2562840, at *1 (Ky. App. Sept. 7, 2007) (Emphasis added). Although Appellants assert that Appellees did not contest this decision, the procedural history of that case reflects that the Supreme Court of Kentucky denied Appellees' motion for discretionary review.

The Hatfields sold their land to Appellants in 2009. On September 3, 2009, Appellees filed a complaint against Appellants seeking a declaratory judgment, injunctive relief, and damages after Appellants denied Appellees access to the right-of-way easement. Appellees specifically claimed that they were entitled to an easement by deed, prescription, implication, and estoppel.

Appellants responded to this complaint with a motion to dismiss. In particular, Appellants argued that Appellees' claim to an easement had been rejected by both the circuit court and the Court of Appeals in the previous action between Appellees and the Hatfields. Accordingly, Appellants contended that the current action was barred pursuant to the doctrine of res judicata and the law-of-the-case doctrine. The circuit court denied the motion to dismiss. Appellees subsequently filed a motion for summary judgment on the grounds that they were entitled to an easement as a result of the concessions made by the Hatfields in the previous action.[3] Appellees also claimed that the circuit court had intended to allow for such an easement.

After reviewing the tape of the original trial, the trial judge (who was also the judge in the previous action) entered an order granting Appellees' motion for summary judgment. The order first referred extensively to the prior proceedings and how the easement issue was dealt with therein:[4]

> In the trial of that action there were various declarations and admissions by the Hatfields and their attorney relative to that right-of-way…. The attorney for the Hatfields, in opening, declared that the Hatfields were not denying the right-of-way and went on to say that "my clients have agreed to give fifteen (15) feet to get in there and you would have to make a pretty sharp turn…. We agree that they can have an easement for ingress and egress to their property…."

---

[3] Both Appellees and the circuit court characterize the statements of the Hatfields and their counsel regarding the easement in the first action as "judicial admissions." While this characterization is perhaps questionable, it is clear that the Hatfields were conceding any dispute regarding Appellees' right to an easement.

[4] The circuit court's specific citations to the video record have been removed.

Danny DeHart testified that the right-of-way was a right-of-way shared between the properties of the McCoys and the Hatfields (Bowens).

Luke Hatfield, testifying as an expert engineer and surveyor for the Hatfields[,] acknowledged the existence of the right-of-way. Luke Hatfield introduced a map depicting the existence of the right-of-way as of the time of the earlier trial.

Doug Hatfield, the predecessor to the Defendants Bowens in this case testified as follows:

> Q. Do you have any problem using that roadway that goes left handed in order to get to the real estate up there?
>
> A. No, I don't.
>
> Q. Do you have any problem with an easement up there?
>
> A. No.

Hatfield described the right-of-way as being 15 feet wide and turning left. Hatfield testified clearly that he had no problem and was not contesting the use of the right-of-way.

In the earlier case the McCoys, the Plaintiffs now, did attempt to have clarification of that easement right made by the Court but the Court, not feeling that the use of the easement was an issue, declined to rule on the same and this Court's decision was affirmed by the Court of Appeals.

This Court finds that there has been no earlier adjudications relative to the easement rights of the Plaintiffs, McCoy[,] across the property of the Defendants, Bowens.

> This Court never intended to landlock the Plaintiffs and [they] would be landlocked absent the right-of-way.

In summary, the circuit court clarified that it had declined to make a definitive ruling in the previous trial as to whether Appellees were entitled to an easement because it did not feel that their right to an easement was in issue. Therefore, it declined to apply either the doctrine of res judicata or the law-of-the-case doctrine. The court entered summary judgment in favor of Appellees and ordered that they were entitled to a fifteen-foot easement. Appellants' motion to alter, amend, or vacate was denied. This appeal followed.

The standards for reviewing a circuit court's entry of summary judgment on appeal are well-established and were concisely summarized by this Court in *Lewis v. B & R Corp.*, 56 S.W.3d 432 (Ky. App. 2001):

> The standard of review on appeal when a trial court grants a motion for 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." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial."

Id. at 436 (Internal footnotes and citations omitted). Since the facts herein are undisputed and we are presented solely with questions of law, this case was

appropriately subject to summary judgment. Because summary judgments involve no fact finding, we review the circuit court's decision *de novo*. *3D Enters. Contr. Corp. v. Louisville & Jefferson County Metro. Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005); *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

Appellants argue that the law-of-the-case doctrine should have precluded Appellees' second suit and the subsequent summary judgment ruling. Appellants specifically contend that the opinion rendered by this Court in the original proceeding holding that Appellees did not enjoy any rights to the subject property should be the law of the case in this matter, as well. Thus, Appellants assert that since Appellees' right to an easement was rejected in that decision, it must also be rejected in this one.

This argument lacks merit, however, because "[t]he law of the case doctrine applies only to the *same* case." *Roberson v. Commonwealth*, 913 S.W.2d 310, 312 (Ky. 1994), *overruled on other grounds by Parks v. Commonwealth*, 89 S.W.3d 395 (Ky. 2002); *see also Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391, 75 L. Ed. 2d 318 (1983), *decision supplemented*, 466 U.S. 144, 104 S. Ct. 1900, 80 L. Ed. 2d 194 (1984) ("As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages *in the same case*.") (Emphasis added). Consequently, the law-of-the-case doctrine is inapplicable here because two different proceedings are at issue. Therefore, Appellants' argument must be rejected.

For the foregoing reasons, the judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

W. Sidney Trivette
Pikeville, Kentucky

BRIEF FOR APPELLEES:

Lawrence R. Webster
Pikeville, Kentucky