

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000773-MR

SHEILA COLLINS; REX COLLINS;
AND DERRICK BLAINE COLLINS

APPELLANTS

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 06-CI-00228

RHONDA F. GRIFFITH; BILLY E.
GRIFFITH; AND HARRY NEIL GLANCY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, NICKELL, AND WINE, JUDGES.

LAMBERT, JUDGE: This is an appeal from the Carter Circuit Court's order granting the appellees, Rhonda and Billy Griffith, an easement by necessity for water, electric, and telephone. After careful review, we affirm.

We initially note that this case has a lengthy procedural history and at one point was a bitter battle between several litigants concerning issues of easements, conveyance of property, and several other significant matters. Ultimately, the parties were able to settle all their disputes save one, which dealt with whether the Griffiths were entitled to an easement by necessity for water, electricity, and telephone to run concurrent with their easement for ingress and egress. The trial court entered summary judgment on April 6, 2010, finding that the Griffiths were entitled to an easement by necessity for water, electricity, and telephone. Before the trial court, there was no dispute of fact or law that the Griffiths met the test for an easement by necessity for ingress and egress onto their property. However, the parties agreed that the easement for water, electricity, and telephone would be submitted to the trial court, which ultimately found for the Griffiths.

The relevant facts are not in dispute. Harry Neil Glancy originally owned the land in dispute, which lies in rural Carter County on US Highway 60 east of Grayson, Kentucky. Glancy subdivided his land into four tracts, and retained one tract for himself, which was the closest tract to US Highway 60. Rex and Sheila Collins purchased a tract from Glancy in 2002. Rhonda and Billy Griffith purchased a tract from Glancy in May 2005. In September 2005, Glancy conveyed the last tract to Derrick Collins.

When Rex and Sheila Collins purchased their tract from Glancy in 2002, they were also conveyed a right-of-way for ingress and egress to US

Highway 60. It is undisputed that when the Griffiths purchased their tract from Glancy in 2005, Glancy had not improved the land and was using it as a “trash dump.”

However, the record indicates that Glancy knew the Griffiths were purchasing the tract with the intention of building a home thereon, as evidenced in the contract for sale Glancy and the Griffiths entered into on March 18, 2005. The contract granted the Griffiths a “road easement from Route 60 to the property and access to water and electric lines.” On April 26, 2005, Billy Griffith and Glancy entered into a “Letter of Intent” in which Glancy agreed to give the Griffiths the “first option to buy” Glancy’s remaining property “in whole or in parts” and “30 days written notice of any sell [sic] of said property.”

After contracting to purchase the land from Glancy, the Griffiths obtained a survey of the property, and on April 14, 2005, the Griffiths’ surveyor prepared a plat and property description for the property and the access easement to be conveyed by Glancy to the Griffiths. On May 23, 2005, the Griffiths completed the purchase of the property from Glancy by general warranty deed of conveyance. However, the deed omitted the access easement and the utility easement Glancy had contracted to convey to the Griffiths.

Thereafter, the Griffiths began to remove Glancy’s trash and cleared the area in preparation for a home site. In addition, the Griffiths improved the existing access road on the easement, constructed a new access road where the

road was virtually impassable, and graveled the road to its end at the shared boundary between the Griffiths' property and Rex and Sheila Collins's property.

On September 26, 2005, Glancy conveyed the third tract to Derrick Collins without honoring the "first option to buy" clause he agreed to offer to the Griffiths in the April 26, 2005, "Letter of Intent." The following day, September 27, 2005, Glancy and Derrick Collins executed a deed of correction modifying the original deed of conveyance. The modification in the deed of correction inserted the language pertaining to the right-of-way for ingress and egress conveyed by Glancy to Rex and Sheila Collins in 2002. The original deed and the deed of correction were recorded on September 27, 2005.

Rex and Sheila Collins were not parties to the 2005 deed of correction from Glancy to Derrick Collins, and the 2002 deed of conveyance from Glancy to Rex and Sheila Collins contains no exclusivity language pertaining to the right-of-way for ingress and egress conveyed by Glancy to Rex and Sheila Collins.

On November 3, 2005, Derrick Collins, through counsel, corresponded with the Griffiths, advising them to "cease trespass and other action on property owned by Derrick Collins, et al.," seeking to prevent the Griffiths from accessing his easement for ingress, egress, and utilities. On November 7, 2005, counsel for the Griffiths responded, advising Derrick Collins of the omission of the easement language in the Griffiths' deed, the Griffiths' significant improvement to the easement, and recommending deeds of correction to cure the omissions in the deed from Glancy to the Griffiths and the deed from Glancy to Derrick Collins.

On December 28, 2005, Glancy and the Griffiths executed a deed of correction modifying the March 18, 2005, conveyance from Glancy to the Griffiths to include a specific grant of an easement for ingress and egress. That deed of correction omitted the grant of the easement for water, electricity, and telephone. Derrick Collins refused to resolve the utilities easement dispute by agreement or deeds of correction. Thus, on June 26, 2006, the Griffiths filed the present action against Glancy requesting reformation of the deed and against Derrick Collins and Rex and Sheila Collins to quiet title; for trespass; for unjust enrichment; and for property damage.

On July 31, 2006, Glancy filed an answer and counterclaim denying the material allegations of the Griffiths' complaint and asserting claims of fraud against the Griffiths. He also requested reformation of the deed.

On August 8, 2006, Derrick Collins, Rex Collins, and Sheila Collins filed a joint answer and counterclaim denying the material allegations of the Griffiths' complaint. Rex Collins asserted a counterclaim against the Griffiths, alleging that they trespassed and caused damage to a thirty-foot portion of their land adjoining the Griffiths' property. On August 17, 2006, Derrick Collins, Rex Collins, and Sheila Collins filed an amended joint answer and counterclaim, substituting Derrick Collins for Rex Collins in paragraph nine of the Collins' counterclaim for property damage and claiming that Derrick Collins was the owner of the thirty-foot portion of land on which the Griffiths allegedly trespassed.

The parties engaged in extensive discovery. The Griffiths' actions against Glancy and the Collinses were bifurcated for trial by agreement of counsel for the Griffiths and for the Collinses. On July 8, 2008, the trial court conducted a bench trial on the Griffiths' claim against Glancy for reformation of the deed. On August 5, 2008, the trial court entered findings of fact, conclusions of law, and judgment and order granting the Griffiths reformation of the deed and an easement for ingress and egress and for water, electricity, and telephone across Glancy's tract to the shared boundary line of Glancy and Derrick Collins. The judgment specifically provided that it did not determine the rights or the liabilities of Derrick Collins, which remained pending before the trial court for additional proceedings, leaving the Griffiths approximately 240 feet short of reaching their tract of land.

The trial court concluded that the deed and deed of correction from Glancy to the Griffiths should be reformed due to mutual mistake; the Griffiths proved the mutual mistake by clear and convincing evidence; and the Griffiths and Glancy agreed upon terms different than those appearing in the deed. The trial court also concluded that the Griffiths, as unsophisticated purchasers, acted reasonably in relying upon an attorney to prepare the original and corrected deeds to effectively transfer title of the ten acres with the proper description and terms to which they had negotiated and that equity dictates reformation of the deed of conveyance and the deed of correction. Glancy has not appealed the August 5, 2008, findings of fact, conclusions of law, and judgment and order.

Griffith and Derrick Collins engaged in additional discovery and pre-trial motions. On February 2, 2010, the trial court held a bench trial on the remaining claims between the Griffiths and the Collinses. The parties advised the court that they had reached an agreement regarding the issue of a grant to the Griffiths of an easement across Derrick Collins' tract for ingress and egress, but had not reached an agreement regarding the Griffiths' right to an easement over the same land for utilities by necessity. As stated above, on April 6, 2010, the trial court entered summary judgment awarding the Griffiths an easement for water, electricity, and telephone by necessity. Derrick Collins, Rex Collins, and Sheila Collins now appeal, although no arguments are made in the briefs about Rex and Sheila Collins's property.

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifes v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Thus, our review of a trial court's entry of summary judgment is *de novo*. In the instant case, there are no genuine issues of material fact, and therefore we will only review the trial court's judgment that the Griffiths were entitled to judgment as a matter of law.

Derrick Collins makes several arguments on appeal. First he argues that there was no necessity for the easement for water, electricity, or telephone at the time the tracts of land were severed.

The three prerequisites to 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. *Carroll v. Meredith*, 59 S.W.3d 484, 491 (Ky. App. 2001). As opposed to the reasonable necessity associated with quasi-easements, “strict” necessity has traditionally been applied to easements by way of necessity. Strict necessity has been defined as absolute necessity such as where property is land-locked or otherwise inaccessible. *Id.*

Collins argues that at the time the property was severed, Glancy was using the land as a trash dump, which did not require the use of any utilities. Thus, because the necessity for utilities did not exist at the time of severance, the Griffiths were not entitled to an easement for utilities now.

We disagree with the appellants’ reasoning that an easement was not created in favor of the Griffiths by strict necessity. The trial court made a specific finding regarding the necessity of an easement for access and utilities in its August 5, 2008, order: “The real property conveyed to the Griffiths is cut off from Route 60 making the ‘road easement’ and ‘access to water and electric lines’ a necessity.” Glancy’s property cut off the Griffiths’ property from ingress and egress and access to utilities prior to and after the conveyance of a portion of Glancy’s property to Derrick Collins. Given that the same easement the Griffiths are currently using for ingress and egress will be used to supply utilities to their

property, we do not see how there will be much, if any, burden on Derrick Collins' property. The record indicates that Glancy knew at the time he was granting the property to the Griffiths that they intended to use it to build a residence, and thus at the time the property was severed, a necessity existed for both access and utilities, but was inadvertently omitted from the deeds and the deed of correction. We disagree with Collins' insinuation that the Griffiths should only be permitted to use the property as Glancy was using it, as a trash dump.

We find Derrick Collins' argument that there are other means for the Griffiths to provide utilities to their property, and thus an easement for such not to be a strict necessity, to be disingenuous. In his brief to this Court Collins argues that the Griffiths could use their cell phones to obtain telephone access on their property. Collins also suggests that the Griffiths dig a well for water and obtain electricity via a generator. There is nothing in the record to support the logic of using any of these means to obtain utilities and water, and thus we find Collins' argument in this regard to be tenuous.

In support of his argument that other means of providing utilities to the property exist, Collins argues that in Kentucky, public utilities are granted the right of eminent domain. Collins claims that any public utility could condemn an easement over his property for the purpose of running utilities, and he would receive remuneration for the reduction in value of his property. Collins suggests that the availability of condemnation by public utilities means there is no strict necessity for an easement of water, electric, or telephone over his land.

Again, we find Collins' argument to be somewhat attenuated in this regard. In one breath, he argues that there was no necessity for utilities at the time of severance, and thus no easement by necessity exists now. In the next breath, he argues that there are other ways of getting the necessary utilities to the property, either by generator or via public condemnation by a utility company. If there is no necessity for utilities, why would the Griffiths have to resort to using a generator or why would the power company condemn Collins' property? Again, we agree with the trial court that a necessity for access and utilities existed at the time of severance, and but for a mistake in the formation of the deeds, an easement would have been properly created. This occurred prior to Collins' purchase of the land, and thus the easement by necessity existed prior to Collins even owning the land. The trial court properly determined that an easement by necessity existed for utilities in addition to an easement for ingress and egress.

Finally, Collins argues that his land value will suffer as a result of the imposition of an easement for utilities. The Griffiths counter that the utilities will run along an edge corner of Derrick Collins' property and the utilities would follow the access easement for approximately 240 feet. There is no additional burden on Collins' property because the utilities will follow the same path over the access easement. Thus, we cannot discern any real burden on Collins' land or land value that the easement by necessity for utilities will create.

The Griffiths also argue that they are entitled to an easement for utilities under the theory of quasi-easement. However, the trial court did not

address this argument in its order granting summary judgment, and thus we will not address it on appeal.

For the foregoing reasons, we affirm the April 6, 2010, order of summary judgment by the Carter Circuit Court granting Billy and Rhonda Griffith an easement for utilities by necessity over Derrick Collins' property.

ALL CONCUR.

BRIEF FOR APPELLANT:

R. Stephen McGinnis
Greenup, Kentucky

BRIEF FOR APPELLEE:

Todd Trautwein
Morehead, Kentucky