RENDERED: AUGUST 9, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001961-MR
AND
NO. 2011-CA-002091-MR

DOYLE AND JANET BENTLEY,
AND RACHEL JOHNSON — APPELLANTS/CROSS-APPELLEES

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 10-CI-00446

RANDY AND DIANE MAGGARD — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

CLAYTON, JUDGE: Doyle and Janet Bentley appeal the Laurel Circuit Court's order that granted Randy and Diane Maggard's motion for partial summary judgment wherein the trial court determined that the Maggards had a right to use

an easement on the Bentleys' property. In addition, the Maggards submitted a cross-appeal in which they claimed that the trial court's denial of their motion for attorney's fees was in error. After careful review, we affirm the Laurel Circuit Court on both decisions.

FACTUAL AND PROCEDURAL BACKGROUND

In 1972, William U. "Boots" Johnson (hereinafter "Boots") and his wife, Rachel Johnson, purchased property in Laurel County, Kentucky, near county roads that were later named High Top Road and High Top Spur. Over the years, Boots partitioned and sold sections of this property. In a 1992 sale of property to the Bentleys, the deed included the description of an easement that was on a portion of the purchased property. The effect and meaning of the language concerning this easement is the crucial issue in this litigation.

Randy and Diane Maggard argue that they are beneficiaries of the easement and, therefore, are entitled to use the easement as a means of ingress and egress to and from their property. Their property touches the Bentleys' easement. They claim that the Bentleys unlawfully blocked their right to use the easement. In contrast, Doyle and Janet Bentley claim that the deed referencing the easement never created an easement for the use of Randy and Diane. Further, the Bentleys maintain that through adverse possession they now possess and control the easement to the exclusion of all others.

The history of the pertinent transactions is as follows:

June 2, 1984 - Boots and his wife sell a tract of land to Randy and Diane Maggard. (This property is not a part of the dispute.)

June 28, 1991 - Boots and his wife sell a tract of land to Joseph Maggard.

July 9, 1992 - Boots and his wife sell a tract of land to Doyle and Janet Bentley. The easement is described in the deed.

February 12, 1997 - Joseph Maggard, and his wife, Jamie, sell the above-cited property (1991 transaction) to Randy and Diane Maggard.

April 21, 2010 - Doyle and Janet Bentley obtain a deed of correction, which is signed by Rachel Johnson and her power of attorney. The purpose of the deed of correction, ostensibly, is to explain the original intent of the sellers and buyers of the easement described in the Bentleys' 1992 deed.

Thus, at the time the complaint was filed, Randy and Diane Maggard still lived on the property originally purchased from Boots in 1984. (This property is not the subject of the litigation.) In 1997, Randy and Diane purchased property from Joseph Maggard, which is the subject of this dispute. This property was purchased by Joseph purchased from Boots in 1991, is adjacent to the Bentleys' property, and has the use of easement on the Bentleys' property, which was purchased in 1992. It is this easement that is contested.

Donnie Maggard, the son of Randy and Diane, now lives on the property with Janet, his wife. They have built a home on the property. He and his wife began building the home in 2010. Issues concerning the right to use the easement were precipitated by the construction of the home. Apparently, in early

2010, someone tried to remove a fence from the Bentleys' property where the easement lies. The Bentleys claimed it was Donnie and that he was not entitled to use the easement.

According to the Bentleys, the intent of the original language in the deed about the easement only allowed Joseph Maggard and themselves to use it. To clarify this matter, the Bentleys, on April 21, 2010, obtained a deed of correction, which they allege was executed to correct a purported "scrivener's error" in the 1992 deed and clarify the original intent of the grantor.

Besides the Bentleys' signatures, Rachel Johnson, Boots's widow and an original grantor, signed the deed of correction with Carolyn Bales, her power of attorney, also signing it. Although Rachel Johnson was named as a plaintiff in the original action and is an appellant, her only involvement in the litigation is the signing of the deed of correction. Currently, Rachel resides in a nursing home and, as noted, has a power of attorney to act for her. Boots, the primary actor in the execution of the original deed, died in 2000.

The Bentleys claim that the deed of correction rectified any misconception about the parties' intent in the deed language regarding the easement. The proffered deed of correction confirmed that the easement was created only for the Bentleys and Joseph Maggard's use, enjoyment, and possession. Nonetheless, Randy and Diane Maggard respond that the deed of correction is a sham and should be declared null and void. Additionally, the

Bentleys insist that the doctrine of adverse possession also supports their assertion that they have the right to exclusive control, use, and possession of the easement.

On April 27, 2010, Randy and Diane Maggard filed a complaint in which they asserted that they have a right to use the easement. In the complaint they ask, among other things, for a court order declaring the existence of a right-of-way easement in the 1992 deed. In response, on June 10, 2010, the Bentleys filed a counterclaim. In the counterclaim, they assert that they have the exclusive right to use the easement because by right of adverse possession, they have used it openly, continuously, notoriously, uninterrupted, and under color of title for more than fifteen years. (Specifically, they say that they have used it exclusively for seventeen years.)

Both parties then filed motions – the Bentleys for summary judgment and the Maggards for partial summary judgment. A hearing was held on July 8, 2011, at which the trial judge informed the parties that the trial court's decision would be made after the parties filed briefs. Thereafter, on August 12, 2011, the trial court issued its order wherein it ruled that there was no genuine issue of material fact and that the original deed fully supported the use of the easement by the heirs and future owners of property abutting the easement, that is, Randy and Diane Maggard. The trial court granted the Maggards' motion for partial summary judgment and denied the Bentleys' motion for summary judgment.

The parties filed a variety of post judgment motions. On September 13, 2011, the trial court entered a final judgment. In the final judgment, the trial

court denied the Bentleys' motion to alter, amend, or vacate and their motion to reconsider; denied the Bentleys' renewed motion for summary judgment; denied the Maggards' motion for attorney's fees; and, granted the Maggards' motion to dismiss the claim for trespass and damages.

Another motion to alter, amend, or vacate was made by the Bentleys that referenced the September 13, 2011 final judgment. On October 18, 2011, and October 19, 2011, the trial court entered orders denying the latter motions. The Bentleys now appeal from these two orders, and the Maggards cross-appeal from the final judgment on the issue of attorney's fees.

STANDARD OF REVIEW

Appellate review of a circuit court's decision to grant summary judgment is reviewed *de novo*. *Harstad v. Whiteman*, 338 S.W.3d 804, 809 (Ky. App. 2011) (citing *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001)). Summary judgment is appropriate when a "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).

For a grant of summary judgment to be proper, the trial court must ascertain whether "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure

(CR) 56.03. Moreover, summary judgment is correct where it "appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr. Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). When deciding a motion for summary judgment, the record must be viewed in the light most favorable to the party opposing the motion. *Id*.

Regarding the burden of proof, 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 482. The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Id*. at 480. With this standard in mind, we will examine the Bentleys' claims of error regarding the trial court's grant of partial summary judgment to the Maggards.

ANALYSIS

In their appeal, the Bentleys make several arguments. They contend that the trial court erred when it failed to grant them summary judgment on their claim of ownership of the easement by adverse possession or alternatively, the trial court should have allowed them a jury trial as to the claim of full ownership of the easement. Similarly, the Bentleys maintain that the trial court erred when it granted the Maggards' partial motion for summary judgment. They allege that the trial court's interpretation of the language of the 1992 deed, as a matter of law, was incorrect. Moreover, the Bentleys claim that the 2010 deed of correction

accurately reflects the intent of the language in the 1992 deed. Finally, should we determine that a genuine issue of material fact exists regarding the deed, they are then entitled to a jury trial on this issue.

The Maggards respond that the trial court properly denied the Bentleys' motion for summary judgment and granted their motion for partial summary judgment. The intent of the parties, particularly the grantor, Boots, is clear from the language of the deed. There is an easement on the Bentleys' property that runs with the deed in favor of Joseph Maggard and successive landowners of his property. The easement grants these landowners the privilege to traverse the Bentleys' property to gain access to their property. In addition, they deny that adverse possession of the easement was established by the Bentleys. Finally, they argue that they are entitled to attorney's fees in light of behavior by the Bentleys, which they characterize as fraudulent and bullying.

Intent of parties to the original deed

The foremost question here involves the intent of the Johnsons when, in 1992, they conveyed property with an easement to the Bentleys. In order to ascertain this intent, we consider the language found in the deed. The deed's language granted a right-of-way easement extending 265 feet beyond the end of High Top Road along the Joseph Maggard property line. The language in the deed about the easement says:

> Also conveyed from first parties herein to second parties herein is a permanent easement and permanent right-of-way to inure to future land owners, this permanent

> easement and permanent right-of-way being described more fully as follows:
>
> Being at least twenty-five-foot (25-ft.) permanent roadway and permanent right-of-way running from the place at which the Doyle Bentley property joins the Joseph Maggard property;
>
> Thence, running along the Joseph Maggard property line for a distance of approximately two hundred sixty-five feet (265-ft.);
>
> And being a permanent roadway and permanent right-of-way for access to and egress from the Doyle Bentley property as herein conveyed and any other Doyle Bentley property as located in the general area otherwise, said permanent roadway and permanent right-of-way to run from county road known as High Top Road to give access from and to such road as herein described.
>
> It is specifically understood and agreed that this permanent roadway and permanent right-of-way shall inure to the benefit of future land owners and shall benefit to an adjoining landowner, to wit: Joseph Maggard and shall permanently "run with the land" herein conveyed.

Having read the language of the easement, the next step is to discuss the definition of an easement. An easement is a "property right or interest in land" of another. *Illinois Cent. R. Co. v. Roberts*, 928 S.W.2d 822, 826 (Ky. App. 1996). It is a "right, distinguished from ownership, to use in some manner the land of another for a specified purpose." *Inter–County Rural Elec. Co-op. Corp. v. Reeves*, 294 Ky. 458, 171 S.W.2d 978, 983 (Ky. App. 1943); *see also Henry Bickel Co. v. Texas Gas Transmission Corp.*, 336 S.W.2d 345, 347 (Ky. 1960).

Easements can be in gross or appurtenant. The distinction is that in an easement in gross there is no dominant tenement to which it is attached, but in an easement appurtenant there is a dominant tenement to which it is attached. *Meade v. Ginn*, 159 S.W.3d 314, 320 (Ky. 2004) (quoting 25 Am. Jur. 2d *Easements and Licenses in Real Property* § 11 (1996)). Accordingly, where an easement appurtenant has been created, two distinct tenements are involved - the dominant estate to which the right belongs (Joseph Maggard and future landowners) and the servient estate (the Bentleys), which bears the burden. *Scott v. Long Valley Farm Kentucky, Inc*., 804 S.W.2d 15, 16 (Ky. App. 1991).

Also observed in *Meade*, the easements are created by contract between adjacent landowners for the common use of property to enhance the usefulness and value of both properties, usually with respect to ingress and egress. The result is the creation of easements appurtenant to both properties enforceable by subsequent grantors of each original owner. Am. Jur. 2d *Easements and Licenses in Real Property* § 21 (1996). *Meade* at 317.

In addition, an easement is distinguished from ownership and instead is a privilege or an interest in land, which invests the dominant estate with "privileges that he cannot be deprived of at the mere will or wish of the proprietor of the servient estate." *Louisville Chair & Furniture Co. v. Otter*, 219 Ky. 757, 294 S.W. 483, 485 (Ky. App. 1927). And, in contrast to a restrictive covenant that restricts the use and enjoyment of property, an easement confers a right upon the

dominant tenement to enjoy a right to enter the servient tenement. *See Scott v. Long Valley Farm Kentucky, Inc.*, 804 S.W.2d 15, 16 (Ky. App. 1991).

In light of these definitions and explanation of the terms, here the easement is an easement appurtenant. Under the language of the 1992 deed, the land purchased by the Bentleys has an easement appurtenant, which provides the adjacent land owner, Joseph Maggard and successive owners of the land, with the privilege to ingress and egress their property through the Bentleys' property. As such, the Bentleys are the occupiers of the servient estate and the Maggards occupy the dominant estate.

The Bentleys have known about the property's encumberment since they purchased it in 1992. The language about the easement is found in the deed. They freely participated in the purchase of the land and had notice of the easement. "A person who purchases land with knowledge or with actual, constructive, or implied notice that it is burdened with an easement in favor of other property ordinarily takes the estate subject to the easement." *Dukes v. Link*, 315 S.W.3d 712, 716 (Ky. App. 2010)(citing 25 Am. Jur. 2d *Easements and Licenses in Real Property* § 93 (2004)).

Continuing with the discussion of easements, an easement, which is appurtenant, may be permanent. In fact, an easement granted without a specified term is considered permanent and may continue in operation forever. *See* 25 Am. Jur. 2d *Easements and Licenses* § 25 (2013). In the case at bar, the deed has no

specific language terminating the easement and, hence, the easement in question is a permanent easement.

Easements are created by express written grant, implication, prescription or estoppel. An express easement is created by a written grant with the formalities of a deed. *Loid v. Kell*, 844 S.W.2d 428, 429 (Ky. App. 1992). That is the case here since the easement was created by deed. In fact, the Bentleys do not deny that Boots and his wife created an easement in the 1992 deed.

Still, notwithstanding the law and the plain language in the deed, the Bentleys contest the intent of the easement, its effect, and who has a right to use it. Ordinarily, the right to use an easement lasts forever, unless, of course, terminated by an act of the parties (for example, abandonment, merger, or conveyance) or by operation of law, as in the case of forfeiture or otherwise. 25 Am.Jr.2d *Easements and Licenses* § 101 et seq. (1966). Furthermore, an easement appurtenant inheres in the land. *Id*. Our assessment of the language of the deed is that an easement appurtenant in this case was permanent.

To ascertain the intent of the parties regarding the deed, one turns to the language of the deed itself. "If the language is unambiguous, the intent of the parties at the time the easement agreement was executed must be determined from the context of the agreement itself." *Sawyers v. Beller*, 384 S.W.3d 107, 111 (Ky. 2012)(quoting *Texas E. Transmission Corp. v. Carman*, 314 S.W.2d 684, 687 (Ky. 1958). Based on the deed's language, which is clear and unambiguous, Boots's intention was to create a permanent easement appurtenant.

But the Bentleys contest the implication of an easement on their property. Their brief on page 12 states:

> Thus, it is again quite clear from the reading of the Bentleys' 1992 deed, coupled with a reading of the Bentleys' 2010 deed of correction, that the Bentleys never intended to convey, and never conveyed, any ownership rights or any other rights to the Maggards.

In actuality, Boots and his wife were the grantors. It is their intent that is relevant. Thus, the Bentleys did not convey anything with the signing of the deed, but instead, accepted Boots's requirements for the conveyance. And undoubtedly, he conveyed land to them with an easement appurtenant, which granted Joseph Maggard and successive landowners the privilege to cross over the Bentleys' property. The Bentleys possess the servient tenement and the Maggards' the dominant tenement.

As explained above, contrary to the Bentleys' framing of the issue, ownership of the land is not the question. The land that they own contains an easement. And the language about the easement in the deed is clear. There is no genuine issue of material fact about the meaning of the language in the deed or the intent of the grantor concerning the easement; hence, summary judgment was appropriately granted on that issue.

Deed of Correction

Next, we consider the Bentleys' contention that the language of the 1992 deed did not properly represent the intent of the grantor and grantee and, thus, they had the authority to prepare a deed of corrections. According to them,

this new document properly represents and clarifies the intent of the parties. On April 21, 2010, the Bentleys executed a deed of correction to purportedly correct a scrivener's error in the deed. Plus, the Bentleys contend that it more clearly expresses the original intentions of the parties to the 1992 deed. Doyle and Janet vehemently contest the validity of this deed of correction and maintain that it is a sham and should be declared null and void.

This case is not a case where one word was substituted for another. The Bentleys prepared a completely new document. The language in this new document obliterates the meaning of the language found in the original deed. In fact, nowhere do the Bentleys highlight the scrivener's error that the document ostensibly corrects. In Black's Law Dictionary (9th ed. 2009), the doctrine of scrivener's error is defined as "[a] rule permitting a typographical error in a document to be reformed by parol evidence, if the evidence is precise, clear, and convincing." In the case at hand, no supposed clerical error is pinpointed. Rather, the so-called corrections actually result in a completely new document.

Furthermore, even if there had been a clerical error, its correction does not defeat the parties' original intent when property is conveyed. This is a case where the deed, on its face, explains the obvious conveyance of an easement on the property transferred to the Bentleys. Nothing within the deed indicates anything else.

Although the Bentleys allege the 2010 deed of correction makes clear the original intent of the signatories of the 1992 deed, in our view, a document

created approximately eighteen years after the original deed has questionable reliability. The Bentleys, other than their own self-serving statements, offered no evidence that suggests any other intent by Boots in the deed. Besides, we are restricted to the evidence found in the deed regarding the parties' intent, absent some other proof of intent, which was not provided. *Dennis v. Bird*, 941 S.W.2d 486 (Ky. App. 1997). And, furthermore, notwithstanding the failure to provide any parol evidence suggesting a different intent by the grantors or grantees, we believe that their intent is obvious in the original deed.

To conclude, the plain language of the deed points out that Boots created an easement on the land purchased by the Bentleys. No parol evidence was provided to suggest differently. Moreover, for obvious practical and public policy purposes, the law cannot permit parties to submit entirely new documents in order to completely reconstruct an original instrument. Therefore, the deed of correction is null and void, and no genuine issue of material fact remains on this issue.

Adverse possession

Notwithstanding the deed of correction, the Bentleys maintain that even if there was an easement, they have extinguished the easement and have actual and outright ownership to the exclusion of all others by way of adverse possession. In light of this factor, they claim that the rights to the easement have been extinguished because they, for at least seventeen years, have occupied the easement openly, continuously, notoriously, without interruption and under color of title

But the adverse possession argument posited by the Bentleys is inapposite. They own the property already. A party cannot claim adverse possession of his or her own property. And, the question is not one of ownership. The Maggards are not claiming an ownership interest. Rather, the question is whether Doyle and Janet, based on the presence of an easement, have the privilege to use the easement to access their property.

Therefore, since the issue is not adverse possession as relates to ownership of the property, many of the Bentleys' arguments supporting the adverse possession claim have no meaning because they directly relate to ownership. For instance, the Bentleys' contentions about the continuous possession of the property from 1992 until 2010 and the payment of taxes are not pertinent to the adverse possession but merely the artifacts of ownership of property.

Thus, we turn to the issue at hand – the Bentleys' contention that the easement had been extinguished by adverse possession. To support this claim, the Bentleys argue that the easement is no longer in effect because of certain actions on their part. Does adverse possession, as explained by the Bentleys, allow for an extinguishment of easements?

As expressed by our court, "[f]orfeiture of easements is not favored in the law and its mere nonuse without adverse possession is not sufficient to establish abandonment." *Dukes*, 315 S.W.3d at 718. The court goes on to articulate that when an easement is created by deed, extinguishment occurs "only

where in connection with nonuser there is a denial of title, or an act by an adverse party, or attendant facts and circumstances showing an intention on the part of the owner of the easement to abandon it." *City of Harrodsburg v. Cunningham*, 299 Ky. 193, 184 S.W.2d 357, 359 (Ky. 1945)(quoting *Johnson v. Clark*, 22 Ky. L. Rptr. 418, 57 S.W.474, (Ky. App. 1900)). As explained in *Cunningham,*

> An easement may be abandoned in whole or in part and either by unequivocal acts showing clear intention to abandon and terminate the right or by acts in pais without deed or other writing. The intention to abandon is the material question and may be provided by an infinite variety of acts. It is a question of fact to be ascertained from all the circumstances of the case.

Id. at 359. The rule was also elucidated in *Schade v. Simpson*, 295 Ky. 45, 173 S.W.2d 801, 803 (Ky. App. 1943):

> Adverse possession and use for the prescriptive period will terminate an easement, but, to be effective, adverse possession of a right of way by the servient owner must be of the same character required to obtain title to real estate and the use must be wholly inconsistent with the right to enjoy the easement and amount to an ouster of the dominant owner.

Consequently, for the Bentleys to establish extinguishment of the easement by adverse possession, they must establish that the Maggards' use of the easement was wholly inconsistent with their right to use it. The Bentleys have not given any material facts to establish that the Maggards did not use the easement. Indeed, their desire to use the easement is the crux of the matter. In sum, the Bentleys have not provided any material facts showing that the possessors of the dominant tenement, the Maggards, abandoned the easement.

The first time that the Bentleys objected to use of the easement did not occur until 2010. Until then, no information was provided that the Bentleys interfered with the Maggards' use of the easement. The Bentleys characterize Joseph Maggard's use of the easement as based on their permission for him to use it. This assertion is disingenuous – he did not need permission. In fact, ample evidence exists that Joseph Maggard did not abandon the easement and that his predecessors still use the easement. The Bentleys have not shown that a genuine issue of material fact supports their assertion that the easement has been extinguished through adverse possession. Thus, the trial court did not err in granting the partial summary judgment motion of the Maggards.

Attorney's fees

On cross appeal, Randy and Diane maintain that the trial court erred when it denied their motion for attorney's fees. It is well settled that the decision whether to award costs and attorney's fees to a party is within the sound discretion of the trial court, and its decision will not be disturbed on appeal absent an abuse of discretion. *Giacalone v. Giacalone*, 876 S.W.2d 616, 621 (Ky. App. 1994).

Here, the Maggards made a motion for attorney's fees and court costs on August 30, 2011, which was denied by the trial court in its final judgment. This motion was made more than a year after they filed their complaint on April 27, 2010. They argue that an award of attorney's fees is proper because the Bentleys

have engaged in fraud. Yet, in the complaint, Randy and Diane request that the Bentleys pay their court costs and attorney's fees but make no mention of fraud.

The Maggards highlight the case, *O'Rourke v. Lexington Real Estate Co. L.L.C.*, 365 S.W.3d 584, 587 (Ky. App. 2011). The Court held in that case that a party must state in plain and adequate terms the basis for any claim in its complaint. Additionally, CR 8.01 provides that a claim "shall contain (a) a short and plain statement of the claim showing that the pleader is entitled to relief, and (b) a demand for judgment for the relief to which he deems himself entitled."

Despite the Maggards' averment that their request for attorney's fees in the complaint implicates and allows for them to now argue fraud on the part of the Bentleys, our conclusion is that Randy and Diane failed to properly plead fraud in the original complaint and, thus, cannot use it to bolster the claim for attorney's fees.

In Kentucky, attorney's fees cannot be awarded absent a statute or contract expressly providing that the other party shall pay. *Batson v. Clark*, 980 S.W.2d 566, 577 (Ky. App. 1998). Hence, attorney's fees are generally not recoverable without a specific contractual provision or a fee-shifting statute. *AIK Selective Self-Insurance Fund v. Minton*, 192 S.W.3d 415, 420 (Ky. 2006). Kentucky courts follow the "American Rule," which deems that in the absence of statute or contract expressly providing for attorney's fees, such fees are neither allowable as costs nor recoverable as an item of damages. *See Dulworth &*

Burress Tobacco Warehouse Co. v. Burress, 369 S.W.2d 129 (Ky. 1963), and *Craig v. Keene*, 32 S.W.3d 90 (Ky. App. 2000).

It is true, however, that a trial court, depending on the circumstances, may rely on its equitable powers to award attorney's fees even in the absence of statutory or contractual obligation. For example, as we stated in *Kentucky State Bank v. AG Services, Inc.*, 663 S.W.2d 754-55 (Ky. App. 1984), "[t]his rule does not, we believe, abolish the equitable rule that an award of counsel fees is within the discretion of the court depending on the circumstances of each particular case."

In the case at hand, no specific statute or contractual provision allows for attorney's fees. Even though the complaint made a request for attorney's fees, it did so without any reference to alleged fraud on the part of the Bentleys. Further, since Kentucky courts are guided by the American Rule, then each party is responsible for his or her own attorney's fees. Finally, while the trial court may have equitable powers to award attorney's fees, no statute or case law requires that a trial court do so. Accordingly, we do not discern any abuse of discretion on the part of the trial court in making the decision to deny the motion for attorney's fees, and we affirm its decision.

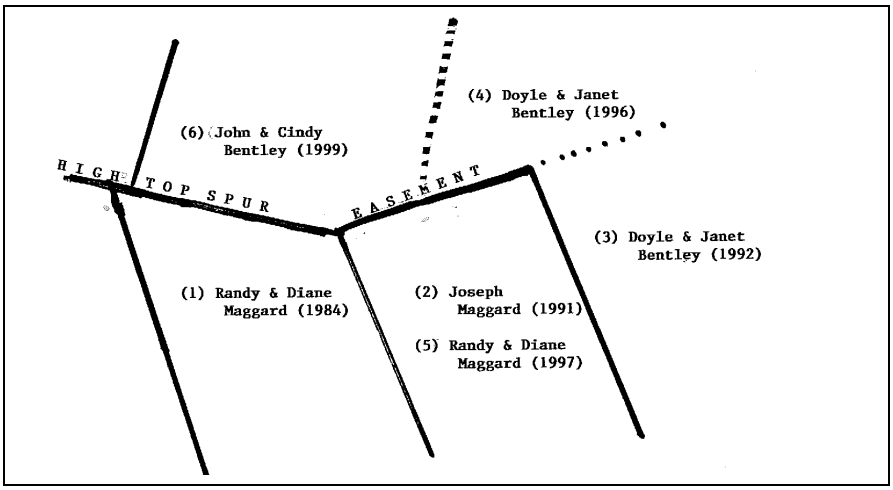
CONCLUSION

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

LAMBERT, JUDGE, CONCURS IN RESULT ONLY.

VANMETER, JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

JUDGE VANMETER, CONCURRING IN RESULT: I concur in the result reached by the majority opinion, but, in my view, the majority opinion does not adequately describe the location of the tracts in question or the location of the easement in relation to those tracts. As a result, the majority opinion imprecisely applies law to facts. The end result is the same: the Maggards are entitled to the use of a twenty-five foot strip of land that abuts their northerly property line, *i.e.*, the property which was acquired by Joseph Maggard in 1991. For reference purposes only, a diagram of the approximate location of the properties, and their relation to High Top Spur and the easement in question is shown below.[1]



As shown, Boots and Rachel Johnson sold the tracts in somewhat of a counterclockwise fashion, with the initial sale to Randy and Diane Maggard

[1] This diagram is based on the aerial photograph which was attached to the trial court's opinion. The solid lines are relatively clear from the map attached to the trial court's opinion; the dotted property lines are estimates, and not necessary to our decision.

(transaction 1); then to Joseph Maggard (transaction 2); and then to Doyle and Janet Bentley (transaction 3). The problem with transaction 3 was that the tract involved had no access to the High Top Spur; the solution was the easement across the Johnsons' retained property. A close reading of the easement reveals that is what was granted:

> Also conveyed from first parties herein to second parties herein is a permanent easement and permanent right-of-way to inure to future land owners, this permanent easement and permanent right-of-way being described more fully as follows:
>
> Being at least twenty-five-foot (25-ft.) permanent roadway and permanent right-of-way running from the place at which the Doyle Bentley property joins the Joseph Maggard property;
>
> Thence, running along the Joseph Maggard property line for a distance of approximately two hundred sixty-five feet (265-ft.);
>
> And being a permanent roadway and permanent right-of-way for access to and egress from the Doyle Bentley property as herein conveyed and any other Doyle Bentley property as located in the general area otherwise, said permanent roadway and permanent right-of-way to run from county road known as High Top Road to give access from and to such road as herein described.
>
> It is specifically understood and agreed that this permanent roadway and permanent right-of-way shall inure to the benefit of future land owners and shall benefit to an adjoining landowner, to wit: Joseph Maggard and shall permanently "run with the land" herein conveyed.

In reading the majority opinion, the impression is that the easement was granted on property owned by the Bentleys at the time the easement was

granted, which clearly was not so, based on the lay of the land and the timing of the transactions.

I agree that the easement created was an easement appurtenant. *Meade v. Ginn*, 159 S.W.3d 314, 320 (Ky. 2004) (citing 25 Am. Jur. 2d *Easements & Licenses in Real Property* § 11 (1996)). However, by virtue of the language in the 1992 deed, the servient estate was the Johnsons' retained property to the north on the Joseph Maggard property (transaction 2), for a distance of 265 feet, running from the Doyle and Janet Bentley property (transaction 3) in a westerly direction towards the High Top Spur. And, two dominant estates have the benefit of the easement: Doyle and Janet Bentley's 1992 tract (transaction 3), and Joseph Maggard's 1991 tract (transaction 2). Thus, when Doyle and Janet Bentley acquired an additional portion of the Johnsons' retained property (transaction 4), to some extent, that transaction/tract obtained the benefit of the easement, since the easement inured to "any other Doyle Bentley property as located in the general area otherwise." But, that property also serves as the servient estate under the terms of the easement for the benefit of the Joseph Maggard tract. In addition, when Randy and Diane acquired the Joseph Maggard tract (transaction 5), they obtained the benefit of the easement as the new owners of the dominant estate. *See Scott v. Long Valley Farm Kentucky, Inc*., 804 S.W.2d 15, 16 (Ky. App. 1991). The easement similarly continued when the Johnsons sold the remainder of their property to John and Cindy Bentley (transaction 6).

The Bentley's adverse possession argument is ill-founded. As an initial matter, they cite us to, and I have found, no case in which the dominant estate holder has acquired fee title to an easement created by an express grant; *i.e.*, a case in which a dominant estate holder acquired fee title to the servient estate by virtue of using the easement. In this sense, an express easement is a formalized grant of permission. In *Illinois Cent. R. Co. v. Roberts*, 928 S.W.2d 822, 825-26 (Ky. App. 1996), the court noted that "[a]n easement is not an estate in land, nor is it land itself. It is, however, a property right or interest in land. It is an incorporeal hereditament to which corporeal property is rendered subject." (Citations omitted). Furthermore, "[a] railroad easement, like other easements, is nothing more than the right of the railroad to pass over the land of others. In short, it is a right-of-way easement. In no way does it reflect title to or ownership of the land itself." *Id.* at 826. In that case, the railroad had possessed the easement in question for over 80 years, and no doubt had the right to exclude all others from the use of the easement. That use was certainly exclusive, open, continuous, notorious, uninterrupted, and under "color of title" for more than fifteen years. Thus, the grant of the easement in 1992 did not create in the Bentleys a sufficient claim or color of title to the land comprising the servient estate to maintain a claim of adverse possession.

Case law, however, could support a claim that a servient estate owner may, by exclusion, adversely possess the property subject to an easement for fifteen years, and thereby terminate the easement:

> Adverse possession and use for the prescriptive period will terminate an easement, but, to be effective, adverse possession of a right of way by the **servient owner** must be of the same character required to obtain title to real estate and the use must be wholly inconsistent with the right to enjoy the easement and amount to an ouster of the dominant owner.

Dukes v. Link, 315 S.W.3d 712, 718 (Ky. App. 2010) (quoting *Schade v. Simpson*, 295 Ky. 45, 173 S.W.2d 801, 803 (1943)) (emphasis added). In this case, those facts are not present and the Bentleys cannot avail themselves of this means of terminating the easement by adverse possession since they only became owners of a portion of the servient estate in 1996. This action was filed in 2010, prior to the running of the 15-year period necessary to maintain a claim of adverse possession.

One other point worth mentioning is that beginning in 1992, when the Johnsons established the 25-foot easement, both the Bentleys and Joseph Maggard had permission, in a sense, to use the Johnsons' remaining property for access to the High Top Spur. The fact that Joseph Maggard, and now Randy and Diane Maggard, had another means of access to High Top Spur did not affect his right to use the easement. *See Long Valley Farm,* 804 S.W.2d at 16 (holding that fact that owners of dominant estate entitled to water easement had access to city water did not terminate water easement).

BRIEF FOR APPELLANTS/CROSS-APPELLEES:	BRIEF FOR APPELLEES/CROSS-APPELLANTS:
James A. Ridings London, Kentucky	William A. Rice Harlan, Kentucky