RENDERED: JULY 12, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001370-MR

JOHN DAVID MCNALLY — APPELLANT

v.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 10-CI-00448

JAMES MCNALLY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND TAYLOR, JUDGES.

CAPERTON, JUDGE: John David McNally appeals from the July 19, 2011, findings of fact, conclusions of law, and declaratory judgment entered by the Meade Circuit Court regarding a disputed easement between the parties. Finding no error, we affirm.

John David McNally filed a verified petition for declaration of rights pursuant to Kentucky Revised Statutes (KRS) 418.040 and Kentucky Rules of Civil Procedure (CR) 57 over the scope and use of right of ingress and egress over a 60-foot easement. James McNally, John David's half-brother, filed an answer and a counterclaim asking for injunctive relief. The trial court conducted a bench trial on this matter. Both parties testified and Bonnie O'Blander testified as a witness for John David.

At the trial, the court was presented testimony that all of the property involved in the action was at one time owned by the parties' deceased father, John Dee McNally. At the time of his death, the property owned by John Dee was devised to his three children - John David, James, and Bonnie O'Blander. Deeds were prepared to divide the property among the heirs.[1]

John David acquired Lot 1 and Lot 3 in the John McNally Heirs Subdivision. A plat of the subdivision is recorded in Plat Cabinet 7, Sheet 35 of the Meade County Clerk's office. The deed by which John David acquired title to Lots 1 and 3 is recorded in Deed Book 522, Page 281, in the Meade County Clerk's office. Said deed contains the following language granting the easement at issue:

> **Being Lot 1 and Lot 3 in the John McNally Heirs Subdivision,** which plan and plat is of record in Plat Cabinet 7 Sheet 35, office of the Meade County Court Clerk.

[1] The property was divided into three sections for each of the three children. Bonnie ended up not taking Lot 2; instead James acquired Lot 2.

> Lot 1 is subject to a 60 foot easement for ingress and egress to Lot 2 of the John McNally Subdivision (Plat Cabinet 7, Sheet 35).

James acquired Lot 2 by deed recorded in Deed Book 525, page 342 of the Meade County Clerk's office. Said deed contains the following language pertaining to the easement:

> Lot 2 has the right of ingress and egress over a 60 foot easement located on Lot 1 in the John McNally Heirs Subdivision as depicted on the plat of the same of record in Plat Cabinet 7, Sheet 35, Office of Meade County Court Clerk.

A part of this easement had been previously used by the father, John Dee, as a means of accessing the property that later became Lot 2. At that time it was a grass path that was later graveled and was approximately 10 feet in width.[2] James could access Lot 2 from other property that he owns, although that access was difficult due to a sink hole. James had also constructed a garage on the other property impeding easy access to Lot 2.

After hearing the evidence, the court determined that the grant of the easement for ingress and egress, without restrictions, should be presumed to be general in that the easement may be used in such a manner as is necessary for the reasonable occupation and enjoyment of the dominant estate (Lot 2). Moreover, the court concluded that James may use the easement for purposes of accessing Lot 2 by vehicle or on foot and may also lay underground pipes and/or utilities in a

[2] The father refused to grant a 60-foot easement to Bonnie when she wanted to build a house that was going to be located on Lot 2. When he refused to grant the easement, Bonnie built a home elsewhere. We agree with the trial court that this has no bearing on the interpretation of the express easement, given that the easement was granted by John Dee's heirs after his passing.

reasonable manner that allows James the reasonable occupation and enjoyment of Lot 2. It is from this that John David now appeals.

On appeal John David presents one argument to this Court which he maintains merits reversal of the trial court's declaratory judgment: namely, that the court improperly expanded the extent and nature of uses of the subject easement. John David urges this Court to interpret the easement at issue as one solely for the right to enter, leave, and reenter the land in question, as opposed to the trial court's interpretation that the easement should include the right to lay utilities and pipe. James argues on appeal that the trial court correctly interpreted the easement. With these arguments in mind we turn to our applicable jurisprudence.

At the outset we note our appellate standard of review *sub judice.* "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01. Factual findings are clearly erroneous if they are unsupported by substantial evidence. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001). "Substantial evidence is evidence, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005). We review matters of law *de novo*. *Id.*

The construction of a deed is a matter of law and, absent an ambiguity, the intention of the grantor is to be gathered from the four corners of

the instrument. *Phelps v. Sledd*, 479 S.W.2d 894 (Ky. 1972); *Eastham v. Church*, 310 Ky. 93, 219 S.W.2d 406 (Ky. 1949).

Sub judice, we have an express written grant of an easement.[3] It has long been the law in this Commonwealth that we derive the intent of the parties concerning such an easement from the four corners of the deed, absent an ambiguity: "What was in the minds of the parties at the time the easement agreement was executed relative to the intentions of the parties must be determined from the context of the agreement itself, since it is manifest the language of the instrument is not ambiguous." *Texas Eastern Transmission Corp. v. Carman*, 314 S.W.2d 684, 687 (Ky. 1958) (internal citations omitted).

The parties argue extensively over how the easement should be interpreted, specifically as to whether the easement should include the ability to lay underground pipe and/or utilities, which would be necessary for a residence on Lot 2. John David is correct that easements may not be enlarged or extended so as to increase the burden upon, or interfere with, the servient estate. *Commonwealth, Dept. of Fish & Wildlife Resources v. Garner,* 896 S.W.2d 10, 14 (Ky. 1995), citing *City of Williamstown v. Ruby*, Ky., 336 S.W.2d 544 (1960). Moreover, the use of the easement must be as reasonable and as little burdensome to the

[3] *See Loid v. Kell,* 844 S.W.2d 428, 429-30 (Ky. App. 1992):

> An easement may be created by express written grant, implication, prescription or estoppel. *Grinestaff v. Grinestaff*, Ky., 318 S.W.2d 881, 884 (1958); *Holbrook v. Taylor,* Ky., 532 S.W.2d 763, 764 (1976)….A written grant consistent with the formalities of a deed is necessary to create an express easement…Further, the rights created by an easement depend upon the classification of the easement.

landowner as the nature and purpose of the easement will permit. *Horky v. Kentucky Utilities Co.*, 336 S.W.2d 588, 589 (Ky. 1960), citing *Buck Creek R. Co. v. Haws*, 253 Ky. 203, 69 S.W.2d 333. While the parties disagree as to whether the normal development of the land was contemplated, we find such an argument to be resolved by the four corners of the deed.[4]

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[4]*See Cameron v. Barton*, 272 S.W.2d 40, 41 (Ky. 1954):

> Appellant's position perhaps would have merit if we were considering an easement by prescription, but this one was created by deed. As far as the record shows there were no restrictions imposed on the use of the passway. The history of its use shows that it changed with the changing type of occupancy of the dominant estate. Since this was permitted without objection, prior to this suit, by subsequent owners of the servient estate, we must conclude that the owners of the servient estate interpreted the original grant as being one for general passway purposes.
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> The following quotation from Restatement, Property Servitudes, Section 484, which is quoted in *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Barker*, Ky. 1951, 247 S.W.2d 943, 946, is applicable here:
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> > "In ascertaining, in the case of an easement appurtenant created by conveyance, whether additional or different uses of the servient tenement required by changes in the character of the use of the dominant tenement are permitted, the interpreter is warranted in assuming that the parties to the conveyance contemplated a normal development of the use of the dominant tenement."
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> Considering the numerous deed references in appellant's chain of title, which simply refer to the 'right of passway' without fixing any limitations, and considering the permitted use of the passway for a great many years for a purpose different from that for which it was used following the original grant, we must presume that the original grant was a general one. Such is the practical interpretation of the scope of the easement. *See Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Barker*, Ky. 1951, 247 S.W.2d 943, just above cited. This being so, the passway may be used in such a manner as is necessary in the proper and reasonable occupation and enjoyment of the dominant estate. *See Newberry v. Hardin*, Ky. 1952, 248 S.W.2d 427. As the passage of time creates new needs and the uses of property change, a normal change in the manner of using a passway does not constitute a deviation from the original grant, and modern transportation uses are not restricted to the ancient modes of travel. *See Hodgkins v. Bianchini*, 323 Mass. 169, 80 N.E.2d 464.

Cameron at 41.

See also City of Williamstown v. Ruby, 336 S.W.2d 544, 547 (Ky. 1960):

Sub judice the parties prepared a deed giving the easement in question:

> Lot 2 has the right of ingress and egress over a 60 foot easement located on Lot 1 in the ***John McNally Heirs Subdivision*** as depicted on the plat of the same of record in Plat Cabinet 7, Sheet 35, Office of Meade County Court Clerk.

(Emphasis added).

Looking at the four corners of the deed we agree with the trial court that the express easement in question gave James a 60-foot easement for access to his property by using the terms "ingress and egress." Additionally, it is apparent that the parties contemplated the normal development of the land[5] into a residential

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> Generally, an easement cannot be enlarged or extended so as to increase the burden upon or to interfere with the servient estate. *McBrayer v. Davis,* Ky., 307 S.W.2d 14; *Plunkett v. Weddington,* Ky., 318 S.W.2d 885. 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. *Cincinnati O. & T. P. R. Co. v. Barker*, Ky., 247 S.W.2d 943; *Cameron v. Barton*, Ky., 272 S.W.2d 40. But that interpretation cannot apply in this case, for there has been no development beyond that contemplated at the time of the grant.

[5] *See also Restatement (Third) of Property (Servitudes)* § 4.1 (2000):

> i. Interpretation to carry out purpose of servitude. The purpose of the servitude can be derived from the language of the instrument used to create the servitude, the relationship between the parcels of land burdened and benefited, the use made of the servitude, the use made of the benefited and burdened parcels before and after creation of the servitude, and from other circumstances surrounding creation of the servitude. Generally the inferences that ordinary, reasonable purchasers of property benefited or burdened by the servitude would draw from the language, used in the context of the particular transaction or the character of the neighborhood, determine the purpose to be attributed to the creating parties. Illustrations:
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> . . . .
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> 3. O, the owner of Blackacre, a landlocked parcel, purchased an easement from A, the owner of Whiteacre so that O could build a house on Blackacre. A knew of O's intended use. The deed

subdivision given their use of the term "John McNally Heirs Subdivision." There is little doubt that the use of the term "subdivision" envisions not mere ingress and egress, but utilities and piping as well. We interpret the plain and ordinary meaning of this contractual language to support James's position that utilities and underground piping should be permitted with the easement for the normal development of the land as contemplated by the deed. *See Pace v. Burke*, 150 S.W.3d 62, 65 (Ky. App. 2004). Accordingly, we find no error in the trial court's declaratory judgment.

Finding no error, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Stephen G. Hopkins Hardinsburg, Kentucky	Richard V. Hornung Louisville, Kentucky

conveying the easement specified its location and that the purpose was for access to Blackacre. There was no existing road in the location specified. Absent other facts or circumstances, the deed should be interpreted to give O the right to construct an access way for utilities as well as for people and vehicles, because without access for utilities, O will not be able to use Blackacre for normal residential purposes.