

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000988-MR

TAMARA L. SANDERSON, M.D.

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 16-CI-00178

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, J. LAMBERT, AND MAZE, JUDGES.

JONES, JUDGE: The Appellant, Tamara L. Sanderson, M.D. (“Dr. Sanderson”), appeals an Opinion and Order of the Franklin Circuit Court dismissing her claims for declaratory relief against the Appellee, the Commonwealth of Kentucky (“Commonwealth”). After careful review, we AFFIRM.

I. BACKGROUND

On February 17, 2016, Dr. Sanderson filed a complaint for declaratory relief with the Franklin Circuit Court. Dr. Sanderson's complaint requested that the circuit court declare Kentucky's Boundary Line Fence Act, KRS¹ 256.030 and KRS 256.042, unconstitutional as applied to her and to others similarly situated. Dr. Sanderson's complaint alleges that the Boundary Line Fence Act encroaches on her rights in that it requires her to maintain fences on her land that she does not desire. She further alleges that it impermissibly favors landowners who own and keep livestock to the detriment of landowners, like herself, who do not do so, by requiring them to bear the costs of constructing and maintaining fences that they do not need or desire.

Dr. Sanderson owns property located at 4575 Bosworth Lane in Lexington, Kentucky. The property consists of more than ten acres. Dr. Sanderson does not own or raise livestock on her property, and she is attempting to obtain a conservation easement to prevent future owners from raising livestock on the property. She also does not wish to have any fences on her property. She alleges in her complaint that she is allowing the existing fences on her property to deteriorate.

Dr. Sanderson further alleges in her complaint that she previously had a dispute with an adjoining neighbor regarding a fence. It appears from the record that Dr. Sanderson claimed that her neighbor's fence encroached on her property.

¹ Kentucky Revised Statutes.

She filed suit in Fayette Circuit Court. In the course of the dispute, as part of written correspondence between the parties' counsel, the neighbor raised the Kentucky Boundary Line Fence Act and the possibility that the fence might fall within the Act. Dr. Sanderson and the neighbor eventually entered into a confidential settlement resulting in dismissal of Dr. Sanderson's action.

As for her other neighbors, Dr. Sanderson's petition alleges the following:

14. Dr. Sanderson also has neighbors to the east and north that use their property for agricultural purposes and that, upon information and belief operate thoroughbred farms.

15. In this context, Dr. Sanderson reasonably fears that her neighbors may demand or haul her into court and seek a court order requiring that she pay half the costs of constructing a boundary line fence between their properties.

16. Through the Kentucky Boundary Line Fence Act, property owners across the Commonwealth who raise livestock, desire fences, and live next to property owners who do not possess livestock and/or do not want fences benefit at the expense of their neighbors.

(R. at 4).

The Commonwealth filed a motion to dismiss Dr. Sanderson's petition on the basis that she failed "to show the existence of an actual, justiciable controversy" between herself and the Commonwealth. The Commonwealth further explained in its motion that: "[t]he plaintiff appears to have filed this declaratory judgment action to establish her non-liability under a non-existent dispute under the [Boundary Line Fence Act]." The Commonwealth also argued

that Dr. Sanderson had failed to identify and join all necessary parties to the action. It explained that the Commonwealth was not empowered to unilaterally enforce the Boundary Line Fence Act against Dr. Sanderson; only adjoining landowners have that right under the Act. Dr. Sanderson did not name any adjoining landowners as parties in her declaratory judgment petition.

Following briefing and oral argument, the Franklin Circuit Court entered an order granting the Commonwealth's motion and dismissed Dr. Sanderson's petition on the basis that she "failed to present an actual controversy involving a justiciable question as required under Kentucky's Declaratory Judgment Act." It is from that order that Dr. Sanderson brings this appeal.

II. DECLARATORY RELIEF

The ability to seek declaratory relief is statutory in nature. KRS 418.040 provides:

In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked.

A person "whose rights are affected by statute" is permitted to seek declaratory relief so long as "an actual controversy exists with respect thereto"

KRS 418.045.

When a motion to dismiss a complaint seeking a declaration of rights has been made, the question presented to the court is not whether the plaintiff will ultimately prevail. Rather, such a motion challenges the

sufficiency of the complaint and the court is called on to determine whether the complaint states a cause of action for declaratory relief.

Bank One Kentucky NA v. Woodfield Fin. Consortium LP, 957 S.W.2d 276, 278 (Ky. App. 1997). One reason for dismissing a complaint for declaratory relief, and the ground upon which the circuit court did so in this action, is that no actual controversy exists for the court to resolve.

“The actual controversy requirement is constitutional in origin.” *Berger Family Real Estate, LLC v. City of Covington*, 464 S.W.3d 160, 166 (Ky. App. 2015). Section 112(5) of the Kentucky Constitution grants the circuit court jurisdiction over only “justiciable causes.” “Although evading precise definition, the question of justiciability focuses on ‘whether there is a live controversy for the court to decide.’” *Id.* (quoting *Interactive Gaming Council v. Commonwealth ex rel. Brown*, 425 S.W.3d 107, 112 (Ky. App. 2014)). “For a cause to be justiciable, there must be a present and actual controversy presented in good faith by parties with adverse interests in the subject to be adjudicated.” *Appalachian Racing, LLC v. Family Trust Found. of Kentucky, Inc.*, 423 S.W.3d 726, 735 (Ky. 2014). An actual controversy “occurs when a defendant's position would ‘impair, thwart, obstruct or defeat plaintiff in his rights.’” *Commonwealth v. Kentucky Ret. Sys.*, 396 S.W.3d 833, 839 (Ky. 2013) (quoting *Revis v. Daugherty*, 287 S.W. 28, 29 (Ky. 1926)).

Appellate review of declaratory judgment actions is broader than in most other cases in that the appellate court is not “confined to errors alleged or

apparent in the record.” KRS 418.065; *Rea v. Gallatin Cty. Fiscal Court*, 422 S.W.2d 134, 138 (Ky. 1967). Likewise, if the appellate court determines that the “the action is prematurely brought, or where a ruling in the appellate court is not considered necessary or proper at the time under all the circumstances, [the appellate court] may direct a dismissal without prejudice in the lower court.” KRS 418.065.

III. KENTUCKY’S BOUNDARY LINE FENCE ACT

“The Kentucky Boundary Line Fence Act consists of two substantive statutes, KRS 256.030 and KRS 256.042.” *Abell v. Reynolds*, 191 S.W.3d 1, 3 (Ky. App. 2006). Jurisdiction over claims arising under Boundary Line Fence Act is vested exclusively in District Court. *Id.*

KRS 256.030² provides:

(1) When a division fence exists by agreement, acquiescence or compulsion, under this section or KRS 256.042, each party shall keep a lawful fence on his portion of the line. If one party fails to do so, the person failing shall be liable for all the damages to trees, grass, grain, crops, cattle or land the other party may sustain from the trespassing of cattle over the division fence at the point at which the party failing was bound to keep in repair.

(2) Either party to a division fence shall be liable for damages in case his cattle break through or pass over the fence at any point the other party is bound to keep in

² The 2017 General Assembly amended the statute to substitute the word “cattle” with “livestock.” It further defined “livestock” to mean: “cattle, sheep, swine, goats, horses, alpacas, llamas, buffaloes, or any other animals of the bovine, ovine, porcine, caprine, equine, or camelid species.” See 2017 Kentucky Laws Ch. 129 (SB 139).

repair, only if the fence through which the cattle pass is a lawful fence.

(3) The party damaged shall have a lien on the cattle, as provided in KRS 256.080.

The second statute that makes up the Boundary Line Fence Act, KRS 256.042, provides:

(1) The District Court shall have exclusive jurisdiction over all actions arising under this section or KRS 256.030.

(2) The owner of a parcel of real estate used for agricultural³ purposes may file an action in the District Court to require the initial construction or replacement of a boundary line fence or any portion thereof on the boundary between any parcel of real estate adjacent to the real estate of the plaintiff.

(3) The complaint shall describe the boundary line which is the subject of the action; the use of or the use to which the plaintiff's real estate is to be put; the specific reason that an initial or replacement fence is needed; the type of fence and fence construction that is proposed; whether an existing fence is to be removed; whether vegetation or growth must be removed in order to carry out the construction; the method proposed for removal; and the proposed disposition of the material that is removed.

³ KRS 246.010 defines agriculture as “the business of raising or producing”:

- (a) Crops, the products of which are used for food, feed, fiber, energy, or pharmaceuticals;
- (b) Horticulture products;
- (c) Tobacco;
- (d) Aquaculture products;
- (e) Livestock, poultry, and ratite birds and eggs;
- (f) Milk and milk products;
- (g) Eggs and egg products;
- (h) Bees and bee products; and
- (i) Timber;

(4) The court shall determine if the existing fence is adequate or if no fence exists. If the court finds the existing fence is inadequate or no fence exists, the court shall order the construction of a new fence and shall find and order:

(a) The type of fence to be constructed based upon the use or proposed use of the real estate. Any permanent type of fence construction commonly accepted in the area may be ordered;

(b) If necessary, the removal of vegetation and growth from the boundary line or fence row in order to efficiently construct the fence, and the method of removal, including mechanical means;

(c) Disposition or piling of the removed material;

(d) Apportionment of the cost of the removal of the existing fence, the removal of growth and vegetation and the cost of the construction of the new fence, between the landowners, which shall be one-half (1/2) to each landowner unless the court determines such apportionment to be unconscionable.

(5) The court shall grant the defendant a reasonable time after its order in which to comply with its judgment by constructing a fence in accordance with its order on the defendant's portion of the common boundary. If the defendant fails to comply, the court shall authorize the plaintiff to carry out the terms of its order and the defendant's portion of the cost pursuant to the order shall constitute a lien on the defendant's property and shall bear interest at the legal rate.

(6) In all instances for purposes of maintenance of or construction of a fence on a common boundary line, the boundary line shall be divided between the parties and each landowner's portion shall be determined by assigning to him that portion of the boundary line which is on the right when facing the boundary from that landowner's real estate.

(7) The lien provided herein may be enforced in the Circuit Court according to law if the defendant fails to satisfy the costs of the fence within sixty (60) days of the District Court's order.

IV. ANALYSIS

Dr. Sanderson argues that the trial court committed reversible error when it concluded that no justiciable controversy existed. She maintains that a justiciable controversy does exist because there is an actual controversy regarding the constitutionality of Kentucky's Boundary Line Fence Act as applied to her and other similarly situated landowners who do not keep livestock on their property. She also asserts that the circuit court erred because it addressed the issue of standing.

“A question of whether a litigant demonstrates the existence of an actual controversy affecting his rights which is sufficient to invoke, under the state declaratory judgment act, the court's jurisdiction remains a separate issue from that of whether a party has standing.” *Associated Indus. of Kentucky v. Commonwealth*, 912 S.W.2d 947, 951 (Ky. 1995). In this case, the circuit court discussed standing in its opinion; however, it ultimately dismissed the case on the basis that there was no actual controversy. Because standing is a separate question, we limit our review to the issue of whether Dr. Sanderson's complaint is sufficient to show the existence of an actual controversy.

On this point, we agree with the circuit court that Dr. Sanderson's complaint fails to plead an existing, actual controversy with the Commonwealth. The

Commonwealth itself has no rights under Boundary Line Fence Act and it plays no role in enforcing the statute against individual landowners. Whether the statute is enforced against Dr. Sanderson is entirely dependent on the activities and desires of Dr. Sanderson's neighbors, who are not parties to this action. To this end, Dr. Sanderson has failed to plead that she has any present dispute with any of her neighbors regarding the maintenance or erection of a division fence.

Dr. Sanderson is concerned that under KRS 256.030 she might have some ongoing, present duty to maintain the fences that she alleges are already on her land. However, not all fences between adjoining properties are considered "division fence[s]" under the Kentucky Boundary Line Fence Act. *See Wallace v. Schneider*, 219 S.W.2d 977, 982 (Ky. 1949). To constitute a "division fence" it must be proven that a division fence exists by agreement, acquiescence, or compulsion. *Id.* Dr. Sanderson fails to allege anywhere in her complaint that the fences on her land are actually division fences. Likewise, she has failed to allege that any of her neighbors are actually keeping livestock on the other side of those fences whose escape could subject her to liability.

With respect to KRS 256.042, Dr. Sanderson has likewise failed to allege a present controversy with the Commonwealth. As noted above, the Commonwealth cannot compel Dr. Sanderson to erect or pay for a fence. Only her adjoining neighbors can do so through a District Court action. Dr. Sanderson has failed to show that any of her current neighbors' desire to erect a fence that would fall

within the Act.⁴ Dr. Sanderson tries to satisfy the actual controversy requirement, in part, by relying on a past dispute with a neighbor. She claims that as part of that dispute, the neighbor threatened to use the Kentucky Boundary Line Fence Act against her. That dispute has been settled. “Declaratory relief is not intended as a vehicle for adjudicating allegations of past negligence or damage.” *Mammoth Med., Inc. v. Bunnell*, 265 S.W.3d 205, 212 (Ky. 2008).

Certainly, this Court is mindful that in a claim for declaratory relief, “the question is not one of a present controversy . . . but rather whether there is a justiciable controversy over present rights, duties, or liabilities.” *Bank One*, 957 S.W.2d at 279 (emphasis omitted; internal quotation marks omitted) (citing *Dravo v. Liberty Nat'l Bank & Trust Co.*, 267 S.W.2d 95, 97 (Ky. 1954)). In this case, however, based on the record and applicable law, we cannot say that Dr. Sanderson is being burdened by the Kentucky Boundary Line Fence Act so as to create an actual, justiciable controversy. Dr. Sanderson is not currently being injured or

⁴ We have considered the Kentucky Supreme Court’s recent decision in *Jamgotchian v. Kentucky Horse Racing Comm'n*, 488 S.W.3d 594 (Ky. 2016), *cert. denied*, 137 S. Ct. 493, 196 L. Ed. 2d 403 (2016), but find it distinguishable on the facts. In *Jamgotchian*, the Kentucky Supreme Court held that a licensed thoroughbred owner could seek a declaration regarding the constitutionality of certain claiming regulations based on the fact that he might purchase a horse at a Kentucky claiming race in the future and was subject to the regulations. Unlike this case, the plaintiff in *Jamgotchian* named the Kentucky Horse Racing Commission, the body with authority to enforce the regulations, as a defendant in the action. In this case, Dr. Sanderson named the Commonwealth, but it has only a passive interest in seeing the statute upheld. The only individuals who have the power to enforce the statute against Dr. Sanderson, the adjoining landowners, were not named as parties to this declaratory judgment action. Additionally, it was clear that the plaintiff in *Jamgotchian* was a licensed thoroughbred owner subject to the regulations. In this case, it is not clear that any existing division fence even exists that subjects Dr. Sanderson to the maintenance requirements or that her neighbor’s use of their land would qualify to subject her to the costs of constructing such a fence in the future.

burdened by the Act, nor is she under any threat of injury or burden by any neighboring property owner invoking the Act. Therefore, we agree with the circuit court that Dr. Sanderson failed to raise the existence of an actual, justiciable controversy as required under Kentucky's Declaratory Judgment Act.

Accordingly, we find no error.

V. CONCLUSION

For the reasons stated above, we affirm the Opinion and Order of the Franklin Circuit Court.

ALL CONCUR.

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