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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000517-MR

JASON MORGAN; BETSY MORGAN; MICHAEL BIRGE; JENNA BIRGE; AND DEBORAH L. COOTS — APPELLANTS

v.

APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE JANET J. CROCKER, JUDGE
ACTION NO. 17-CI-00059

PATRICK STOREY AND SHELLENA STOREY — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: DIXON, KRAMER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Jason Morgan, Betsy Morgan, Michael Birge, Jenna Birge and Deborah L. Coots bring this appeal from a February 27, 2018, Declaratory Judgment of the Allen Circuit Court determining that a right-of-way reciprocal

easement existed over real property owned by Jason Morgan, Betsy Morgan, Michael Birge, Jenna Birge, and Deborah L. Coots. We vacate and remand.

Dorothy Pulliam owned a 129-acre farm located in Allen County, Kentucky. Dorothy died testate on July 15, 2008. In her will, Dorothy appointed her surviving children, Ralph Wayne Pulliam and Barbara Smith, as co-executors of her estate. Dorothy also divided her 129-acre farm into five tracts and devised the tracts to Wayne, Barbara, and Shellena (Shelli) Story (Dorothy's granddaughter).[1] During the settlement of Dorothy's estate, Wayne, Barbara, and Shelli negotiated a different division of the 129-acre farm into seven separate tracts. A plat was created reflecting the division of the farm into seven tracts. The plat included a fifty-foot "ingress and egress" from a point in the northeastern boundary line of Tract 3 then in a southwestern direction over Tract 3, thereupon continuing over Tract 2 until it reached Pulliam Lane adjacent to Tract 2.[2] Deeds were also executed contemporaneously with the plat and specifically made reference to the plat.[3] Wayne was conveyed Tracts 1 and 2 by deed dated February 19, 2009; Shelli was conveyed Tracts 3, 6, and 7 by two separate deeds both dated

[1] In her will, Dorothy Pulliam additionally conveyed a life estate in the homestead to her daughter-in-law, Alice Salsman (now Pedigo). Alice ultimately relinquished the life estate.

[2] The ingress and egress road subject to the easement was approximately 200 feet in length and 50 feet in width. At the intersection of Tract 2 and Pulliam Lane, an unlocked gate had been erected across the width of the fifty-foot ingress and egress easement.

[3] The plat and the deeds were recorded in the Allen County Clerk's Office.

March 4, 2009; and Barbara was conveyed Tracts 4 and 5 by deed dated February 17, 2009. The February 19, 2009, deed conveying Tract 2 to Wayne and the March 4, 2009, deed conveying Tract 3 to Shelli both contained language concerning the fifty-foot ingress and egress that was reflected upon the plat.

More specifically, in the February 19, 2009, and March 4, 2009, deeds, Tracts 2 and 3 were subject to a "perpetual" fifty-foot easement "for purposes of ingress and egress from the lands of Ralph W. Pulliam." It is undisputed that the "lands of Ralph W. Pulliam" refer to a separate parcel of 30 acres of real property that was owned by Wayne and that was located contiguous to the northeastern boundary of Tracts 3 and 4.

Wayne passed away on February 24, 2013. Jason Morgan, Betsy Morgan, Michael Birge, Jenna Birge, and Deborah L. Coots (collectively referred to as appellants) are Wayne's successors in title to Tract 1, Tract 2, and the separate parcel of 30 acres. Purportedly, one or more appellants wanted to purchase Tract 3 from Shelli. She declined the offer. Shortly thereafter, on or about December 2016, appellants closed and locked the gate on Tract 2. As a result, Shelli and her husband, Patrick, were prevented from utilizing the fifty-foot easement across Tract 2 to access Tract 3 from Pulliam Lane.

Consequently, Shelli and Patrick (collectively referred to as appellees) filed a petition for declaratory judgment in the Allen Circuit Court against

appellants in 2017. Therein, appellees asserted the fifty-foot easement constituted a right-of-way easement across Tract 2 that inured to the benefit of Tract 3 and that appellants improperly blocked access to such right-of-way easement. Appellees also claimed that the fifty-foot easement qualified as a quasi-easement. Appellants filed an answer and generally denied appellees' claims.

Eventually, the circuit court tried the matter without a jury pursuant to Kentucky Rules of Civil Procedure (CR) 52.01. By Declaratory Judgment entered February 27, 2018, the circuit court concluded that appellees "have a permanent right of way easement over the servient estate of [Tract 2] for ingress and egress to Tract 3 of their property from Pulliam Lane." Declaratory Judgment at 16. The circuit court reasoned that the February 19, 2009, deed conveying Tract 2 to Wayne and the March 4, 2009, deed conveying Tract 3 to Shelli contained a latent ambiguity as to the express fifty-foot easement granted therein. As the deeds contained a latent ambiguity, the circuit court then considered extrinsic evidence and decided that "there was sufficient evidence to establish that Wayne and Shelli entered into reciprocal easement agreements that provided mutual access to their respective properties from Pulliam Lane." Declaratory Judgment at 10. This appeal follows.

Appellants contend that the circuit court erred by determining the deeds conveying Tract 2 to Wayne and Tract 3 to Shelli contained a latent ambiguity. In particular, appellants argue:

> [T]he trial court . . . held that a latent ambiguity in Wayne Pulliam's deed permitted it to consider extrinsic evidence in the form of past statements of Wayne Pulliam; however, it is Appellants' position that the deeds are not ambiguous at all.
>
> . . . .
>
> A plain reading of the subject deeds illustrates the clear intent of the grantors to convey Tract 2 to Wayne Pulliam and Tract 3 to Appellee [Shelli] Storey subject to an easement "for the purpose of ingress and egress from the lands of Ralph W. Pulliam." The deeds clearly intend to burden Tract 2 and Tract 3 as the servient estates for the benefit of Wayne Pulliam's dominant Tract. If the grantors of Tract 2, including Shelli Storey, intended to reserve an easement for the benefit of Tract 3, it would have been expressly stated in the deed to Tract 2. The deed to Tract 2 does not reserve an easement in favor of Tract 3 because the grantors did not intend to do so.
>
> The deeds expressly grants [sic] an easement for the benefit of the "lands of Wayne Pulliam," and Shelli signed the deeds so as to put her on notice of what the deeds said regarding the easement. There can be no other reasonable interpretation of the deeds. Further, the trial court does not identify what about the Tract 2 or Tract 3 deeds is latently ambiguous. The absence of language favorable to Appellees does not equate to a latent ambiguity.

Appellants' Brief at 7, 8, and 10 (citation and quotation omitted).

An easement is generally described as an "incorporeal hereditament to which corporeal property is rendered subject." *Illinois Cent. R.R. Co. v. Roberts*, 928 S.W.2d 822, 826 (Ky. App. 1996). An easement is comprised of a dominant tenement and a servient tenement. *Id*. at 825. The property "owner who enjoys the privilege to use another's land is said to possess the dominant tenement, while the owner burdened with the privilege is said to possess the servient tenement." *Id.* An easement may be express or implied by law. It has been recognized that "[a]n express easement is created by a written grant with the formalities of a deed." *Sawyers v. Beller*, 384 S.W.3d 107, 111 (Ky. 2012). And, with an express easement, "the terms of the conveyance determine the rights and liabilities of the parties." *Id.* The interpretation of a deed presents an issue of law, and our review is *de novo*. *See Florman v. MEBCO Ltd. P'ship*, 207 S.W.3d 593 (Ky. App. 2006).

In this case, the fifty-foot easement was expressly set forth in the February 19, 2009, deed conveying Tract 2 to Wayne and in the March 4, 2009, deed conveying Tract 3 to Shelli. The descriptions of the easements were nearly identical in both deeds and are as follows:

> The February 19, 2009, deed provided, in relevant part:
>
> TRACT 2 IS SUBJECT TO A PERPETUAL 50' EASEMENT FOR PURPOSES OF INGRESS AND EGRESS FROM THE LANDS OF RALPH W. PULLIAM, AS DESCRIBED IN DEED BOOK 97, PAGE 484, ALLEN COUNTY CLERK'S OFFICE, SCOTTSVILLE, KY TO PULLIAM LANE, AS SET

> FORTH IN A PLAT BY PRIDE ENGINEERING AND LAND SURVEYING INC.[,] DATED NOVEMBER 11, 2008.

The March 4, 2009, deed also provided, in relevant part:

> TRACT 3 IS SUBJECT TO A PERPETUAL 50' EASEMENT FOR PURPOSES OF INGRESS AND EGRESS FROM THE LANDS OF RALPH W. PULLIAM, AS DESCRIBED IN DEED BOOK 97, PAGE 484, ALLEN COUNTY CLERK'S OFFICE, SCOTTSVILLE, KY TO PULLIAM LANE, AS SET FORTH IN A PLAT BY PRIDE ENGINEERING AND LAND SURVEYING INC.[,] DATED NOVEMBER 11, 2008.

The above language of the deeds clearly creates an express easement appurtenant to Tract 2, Tract 3, and Wayne's separate 30-acre parcel of real property.[4] Both deeds plainly provide for a right-of-way easement over Tracts 2 and 3 for the benefit of the 30-acre parcel of real property. Thus, Tracts 2 and 3 are the servient tenements and the 30-acre parcel is the dominant tenement. *See Roberts*, 928 S.W.2d at 825.

The circuit court concluded that the February 19, 2009, and the March 4, 2009, deeds contain a latent ambiguity.[5] After so concluding, the circuit court then utilized extrinsic evidence to hold that Wayne and Shelli entered into an oral

[4] It is undisputed that the "lands of Ralph W. Pulliam," as set forth in the February 19, 2009, and March 4, 2009, deeds, refer to the separate parcel of 30 acres owned by Wayne and located on the northeastern boundary of Tract 3 and Tract 4.

[5] A latent ambiguity is "one which . . . is not known to exist until the words are brought in contact with the collateral facts." *Vorherr v. Coldiron*, 525 S.W.3d 532, 543 (Ky. App. 2017) (quoting *Thornhill Baptist Church v. Smither*, 273 S.W.2d 560, 562 (Ky. 1954)).

reciprocal easement agreement that provided mutual access to their properties from Pulliam Lane. However, the deeds are plain and unambiguous in their grant of an express right-of-way easement over Tracts 2 and 3 for the benefit of Wayne's 30-acre parcel of real property. And, no ambiguity was shown to have been created by any "collateral facts" in this case. *See Vorherr v. Coldiron*, 525 S.W.3d 532, 543 (Ky. App. 2017). Thus, the circuit court erred by concluding that a latent ambiguity existed as to either deed.

Accordingly, we are of the opinion that the February 19, 2009, deed conveying Tract 2 and the March 4, 2009, deed conveying Tract 3 to Shelli created an express right-of-way easement over Tracts 2 and 3 for the benefit of the 30-acre parcel of real property only. As Tract 2 is a servient tenement under the plain terms of the express grant contained in both deeds, Shelli has no right to utilize the fifty-foot easement across Tract 2 as set out in the deeds that extends over Tract 3, which is presently owned by appellees. We hold that no latent ambiguity in either deed was demonstrated; thus, the circuit court erred by concluding otherwise.

However, our analysis does not end here. The circuit court engaged in a discussion of the law of quasi-easements, although we are unsure if the court reached a legal conclusion that a quasi-easement was created in this case. Appellants assert that no quasi-easement implied by law exists over Tracts 2 and 3.

Appellants argue that "an easement across Tract 2 is not absolutely necessary for the use of Tract 3 by Appellees." Appellants' Brief at 17.

A quasi-easement by implication primarily "arises from a prior existing use of land." *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001). To demonstrate a quasi-easement by implication, it must be shown:

> (1) that there was a separation of title from common ownership; (2) that before the separation occurred the use which gave rise to the easement was so long continued, obvious, and manifest that it must have been intended to be permanent; and, (3) that the use of the claimed easement was highly convenient and beneficial to the land conveyed.

Id. at 490 (citations omitted). And, our Court has set forth factors to be considered, which are as follows:

> (1) whether the claimant is the grantor or the grantee of the dominant tract; (2) the extent of necessity of the easement to the claimant; (3) whether reciprocal benefits accrue to both the grantor and grantee; (4) the manner in which the land was used prior to conveyance; and (5) whether the prior use was or might have been known to the parties to the present litigation. The courts imply an easement more readily in favor of a grantee than a grantor because a grantor has the ability to control the language in the deed to express the intentions of the parties. Whether the prior use was known, involves not absolute direct knowledge, but "susceptibility of ascertainment on careful inspection by persons ordinarily conversant with the subject." Also, the use must be "reasonably necessary" meaning more than merely convenient to the dominant owner, but less than a total inability to enjoy the property absent the use.

Id. at 490 (citations and quotations omitted).

Upon review of the February 27, 2018, Declaratory Judgment, the circuit court discussed the concept of quasi-easement by implication and engaged in a limited analysis. However, based on our review of the judgment, the circuit court failed to make the necessary findings, nor reached a legal conclusion as to whether a quasi-easement existed over Tract 2 for the benefit of Tract 3. Therefore, we remand this matter to the circuit court to make separate findings of fact and conclusions of law upon whether a quasi-easement by implication exists across the fifty-foot passway on Tract 2 for the benefit of Tract 3. CR 52.01. In so doing, the circuit court shall utilize the analysis contained in *Carroll*, 59 S.W.3d at 490, previously discussed, and shall specifically reach a legal conclusion as to whether there is a quasi-easement by implication over Tract 2 for the benefit of Tract 3, owned by Shelli.

For the foregoing reasons, the Declaratory Judgment of the Allen Circuit Court is vacated and remanded for proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS:

Robert C. Chaudoin
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BRIEF AND ORAL ARGUMENT FOR APPELLEES:

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