IN THE
TENTH COURT OF APPEALS

No. 10-14-00281-CV

UNITED STATES INVENTION CORPORATION, A TEXAS CORPORATION,

Appellant

v.

SHELIA BETTS, JOE BETTS, JO HOGG AND DAVID HOGG,

Appellees

From the County Court at Law
Navarro County, Texas
Trial Court No. C12-20999-CV

DISSENTING OPINION

The development of property in rural areas continues to raise difficult legal issues. Many of the legal issues relate to access to tracts when the ownership, or more particularly the use of the property, changes. *See Montange v. Hagelstein*, No. 10-05-00291-CV, 2006 Tex. App. LEXIS 1996, 817-22 (App.—Waco March 15, 2006, pet. denied) (Gray, C.J., dissenting) (mem. op.). *See also Gaylor v. Stiver*, No. 10-12-00305-CV, 2014 Tex. App. LEXIS 4763 (App.—Waco May 1, 2014, no pet.) (mem. op.); *Fagan v.*

Crittenden, No. 10-04-00042-CV, 2005 Tex. App. LEXIS 1492 (App.—Waco 2005, pet. denied) (mem. op.). *See generally*, *Coryell Cnty. v. Harrell*, 379 S.W.3d 345 (Tex. App.—Waco 2011, no pet.). The sale of a tract that has been accessed by an unimproved lane or trail across another tract for decades can become a point of dispute. Sometimes the dispute arises because the new owner's frequency of access by way of the lane is much more often than the predecessor's. The successor sometimes tries to make their access easier by installing gates or make the lane more convenient by fencing along both sides so that they are not burdened by having to stop and open a gate to pass through what otherwise appears to be a cow pasture or a path hewn through brushy undergrowth.

The legal problems such cases present is that the right of access may have been uncontested and arose long ago. In this case, the alleged access arose almost exactly 100 years ago in a partition suit in 1915. The problem is obviously that there is no one with personal knowledge about the specifics of the route used to access the property in question; or more precisely, the question is what property was used to access the subject property. We are not, however, without means to establish the property used as the route to the subject property. We have old maps, old deeds, old photos, and old-timers. We can even throw in some experts in surveying and cartography; possibly even experts in flora and fauna can add to the pool of available evidence. Such individuals may be able to examine the available data: documents, personal recollections, and

observations as well as scientific research to describe or explain why they believe access was obtained by a certain route or path.

The appellant in this case did not use all the available tools. But as any good craftsman will tell you, tools cost money and you have to work with the tools you can afford. Thus, an expert on soil compaction or in dating the flora might not have been justified in this particular case to establish the age of the lane. But that risk is allocated to the parties to decide what to present to the fact finder by deciding how much of what type of evidence to place before the fact finder to resolve these difficult questions.

The fact finder may never be able to determine the date of the birth and the life of a lane with certainty. Certainty is not required. The only thing necessary to get the issue before the fact finder is some evidence upon which reasonable minds could differ as to whether the access route has been established.

In this case, based on the record at the time that the trial court granted the motion for a directed verdict, I believe there was enough evidence in the record to leave it up to the fact finder. The Court's opinion lays out much of the evidence that I find sufficient to leave this question in the hands of the jury. While it might not have been enough to convince a fact finder, it is enough that the question should have been left to them to decide.

While I will not summarize all the evidence, I do mention one piece of evidence because of the difference it could make in two ways. This is the evidence of the

reservation of the right-of-way by Thomas in the 2002 deed. First I must comment on the legal effect of the reservation. The Court relies on the rule that a stranger to a deed cannot claim a right under it, citing *MGJ Corp. v. Houston*, 544 S.W.2d 171, 174 (Tex. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) ("A reservation or exception in favor of a stranger to a conveyance is inoperative and cannot operate as a conveyance to the stranger of an interest in land."). On the legal issue, alone, I find that case distinguishable. It was not an access case. It was about use of a parking lot by a subsequent owner of an adjoining lot that was not part of the "subdivision" at the time a private parking lot was created. The parking lot easement was not created for the use of the adjoining lot and thus the successor to the adjoining lot could be prevented from using the parking lot. Further, the referenced easement in Thomas's deed to the Hoggs was a reservation from the conveyance. This is not simply an exception to the warranty. The area for use as an easement quite simply was not conveyed to the Hoggs, and Thomas could convey the reserved easement rights therein that he did not convey to anyone he desired for any reason he desired. But then again, it is much more likely that Thomas believed and understood that he could not convey the easement necessary for Smith to enjoy her portion of the partition deed. Moreover, I am uncertain of the standing of the Bettses or the Hoggs to challenge the reservation from Thomas's deed.

But the real importance of this reservation lies in its evidentiary value. By Thomas's unwillingness to give a warranty deed to the Hoggs that covered the easement, it is evident that the direct descendent of one of the partition grantees, Thomas, felt that another of the partition grantees, Smith, had the right of access to their tract over this area. When the Hoggs purchased their property, this reservation was clearly manifest on the face of their deed. Such a reservation could drastically impact the buyer's willingness to purchase the property as well as the price the buyer is willing to pay. The fact finder, in this case a jury, should have been allowed to weigh this evidence, along with the surveyor's and other witnesses' testimony about what the road looked like as well as the "Google" image to decide whether the plaintiff had established a basis for the easement as argued. Even a quick review of the Google picture in the record shows clear demarcations of ancient property lines from which the fact finder may have been able to draw reasonable inferences of the long period of time such attributes had existed as the result of the ownership, access, and use of the subject and surrounding property.

In summary, because the hurdle is low to have "some" evidence of the necessity of the road to establish an easement-by-necessity, and because I think the evidence presented before the trial court when it granted a directed verdict met the low hurdle of some evidence, I would reverse the trial court's judgment and remand this proceeding

to the trial court for a new trial. Because the Court affirms the judgment of the trial court, I respectfully dissent.

TOM GRAY
Chief Justice

Dissenting Opinion delivered and filed January 14, 2016