NO. 12-11-00281-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

CROWN PINE TIMBER 1, L.P., APPELLANT	***§***	***APPEAL FROM THE 1ST***
V.	***§***	***JUDICIAL DISTRICT COURT***
SAMMY DURRETT, APPELLEE	***§***	***SABINE COUNTY, TEXAS***

MEMORANDUM OPINION

Crown Pine Timber 1, L.P., appeals the judgment of the trial court granting an easement by way of necessity across its land for the benefit of Sammy Durrett. In two issues, Crown Pine challenges the easement by necessity and seeks its attorney's fees in this declaratory judgment action. We reverse the judgment of the trial court, render judgment that Durrett has no easement, and remand for a determination of Crown Pine's attorney's fees.

BACKGROUND

This lawsuit arises out of the sale of a tract of land by Crown Pine to Durrett. The property does not have any road access, and Durrett claimed that he was entitled to an implied easement by way of necessity.

1. The History and Configuration of the Land

Temple Inland, which is not a party to this lawsuit, owned a sixty-nine acre tract of land (the Temple tract) in Sabine County, Texas. In 1964, it sold approximately seventeen acres in the middle of the Temple tract to the Sabine River Authority (the SRA tract) that appeared to be sold for flood control purposes. That left approximately twenty-one acres just to the north of the SRA tract (now the Durrett tract), and approximately thirty acres to the south of the SRA tract (the Crown Pine tract). In 2006, Crown Pine Timber 2, L.P., acquired the Durrett tract and the

Crown Pine tract. Crown Pine Timber 2, L.P., transferred the two tracts to Crown Pine Timber 1, L.P., in 2008.

Also in 2008, adjoining landowners, including Durrett, expressed an interest in purchasing the twenty-one acre Durrett tract. Crown Pine issued an invitation to bid on the property. Durrett made the highest offer, which was accepted by Crown Pine, and the parties closed the sale on December 9, 2008.

Durrett already owned the property contiguously adjacent to, and immediately to the north of, the twenty-one acre Durrett tract (the Northern tract). Sometime after he purchased the twenty-one acre Durrett tract, he purchased the land immediately to the south of the Crown Pine tract (the Southern tract). The Southern tract had access to a public road. Neither the Durrett tract nor the Crown Pine tract has access to any public road. It appears that the same is true for the Northern tract. All of the tracts are lakefront property, with the shoreline of the Toledo Bend Reservoir on the eastern boundaries of the property. The only direct access to the Northern tract, the Durrett tract, and the Crown Pine tract appears to be by boat.[1]

Durrett wanted to obtain an easement across the Crown Pine tract, as well as an easement from the Sabine River Authority across the SRA tract, so that he would have road access to all three of his properties. It appears that Durrett wanted to develop these tracts for residential and commercial purposes, given the desirable lakefront nature of these properties. To that end, Durrett first went to the SRA to obtain an easement from it. The SRA indicated that there was a process to obtain the easement, provided the paperwork to Durrett, and implied that it would likely be granted, so long as he first obtained an easement from Crown Pine across the Crown Pine tract.

2. <u>The Dispute</u>

Durrett attempted to secure an easement from Crown Pine, but it demanded $50,000.00. Durrett believed this was unreasonable and negotiations failed. He then filed suit and asked that the trial court sign an order declaring that he was entitled to an implied easement by way of necessity. Crown Pine answered and subsequently filed a counterclaim, seeking a declaratory

[1] The properties to the west are owned by third parties not involved in this dispute.

judgment that Durrett had no easement, and requesting that the trial court also award it attorney's fees under the Declaratory Judgment Act.

Crown Pine moved for summary judgment, which the trial court denied. The parties proceeded to a jury trial. The invitation to bid, which was incorporated as part of Durrett's offer, and the deed itself, were admitted into evidence. Those documents mentioned that no easement would be conveyed.[2] The parties presented conflicting testimony at trial concerning their negotiations for an easement.

After the parties presented their testimony and evidence, they made several objections to the trial court's proposed jury charge during the charge conference, all of which were denied. The jury charge contained three questions. The jury provided conflicting answers. Specifically, the questions in the charge, along with the jury's responses, are as follows:

> Question No. 1
>
> Was an easement necessary in order for [Durrett] to have access to a public road from the tract of land purchased by him from [Crown Pine] on December 3, 2008?
>
> Answer "Yes" or "No"
>
> Answer: ~~Yes~~ ~~No~~ Yes
>
> You are instructed that where there is conveyed a tract of land which is surrounded by the grantor's land, or by his and that of third persons, and to which the grantee can only have access to or access to . . . or egress from through lands other than that conveyed, the grantee has a right of way by necessity over the remaining lands of the grantors. This rule of law may apply when the only land between the land conveyed and the land retained by the grantor is owned by an entity which traditionally grants right-of-way.
>
> Question No. 2
>
> At the time of the conveyance of the [Durrett] tract from [Crown Pine] to [Durrett], did [Crown Pine] own the [Durrett] tract and the [Crown Pine] tract as a single tract?
>
> Answer "Yes" or "No"
>
> Answer: ~~Yes~~ No
>
> Question No. 3

[2] Crown Pine knew that third party neighbors other than Durrett also expressed an interest in purchasing the tract, so it drafted an invitation to bid. In the invitation, Crown Pine stated that the property was landlocked, that there would be no warranties concerning access to the property, and that the offerors should satisfy themselves that they could obtain access to the property. The special warranty deed contained similar exceptions to the warranty of title.

> When [Durrett] purchased the [Durrett] tract, was it surrounded by the land of [Crown Pine] or by [Crown Pine's] land and of third persons?
>
> Answer "Yes" or "No"
>
> Answer: No

Durrett filed a motion for entry of judgment on the verdict, asking that the court enter a judgment in accordance with the jury's finding on Question one, and that it should disregard the jury's answers to Questions No. 2 and No. 3 on the grounds that those questions were immaterial and no evidence supported the jury's findings on them. Crown Pine likewise filed a motion for entry of judgment on the verdict, asking that the court give effect to the jury's answer on Questions No. 2 and No. 3, which meant that Durrett would not have obtained an easement by way of necessity. The trial court agreed with Durrett and issued a judgment in which it stated as follows:

> At the conclusion of the evidence, the Court submitted the case to the jury on written questions, and the jury's answer to Question No. 1 found that [Durrett] was entitled to an easement by necessity . . . . The Court further finds that the answers to Questions No. 2 and No. 3 are not supported by the evidence and are not dispositive of any issue herein. It is therefore ORDERED, ADJUDGED, AND DECREED that an easement of necessity is granted to Durrett [across Crown Pine's Tract C-1] . . . .

Crown Pine filed a motion to modify the judgment, and separately, a motion for new trial, which appear to have been both overruled by operation of law. Crown Pine appealed.

EASEMENT BY NECESSITY

In its first issue, Crown Pine argues that the trial court erred in declaring that Durrett had an easement by necessity across the Crown Tract, and in refusing to issue a declaratory judgment that no easement existed.

Standard of Review

The trial court's judgment must conform to the pleadings, the nature of the case proved, and the verdict. TEX. R. CIV. P. 301. A trial court may disregard a jury finding if the finding is immaterial or if there is no evidence to support one or more of the jury findings on issues

necessary to liability. *See* ***id.***; ***Spencer v. Eagle Star Ins. Co. of Am.***, 876 S.W.2d 154, 157 (Tex. 1994). A question is "immaterial" when it should not have been submitted to the jury, it calls for a finding beyond the province of the jury, such as a question of law, or when it was properly submitted but has been rendered immaterial by other findings. ***Se. Pipe Line Co., Inc. v. Tichacek***, 997 S.W.2d 166, 172 (Tex. 1999); ***Spencer***, 876 S.W.2d at 157. When the trial court disregards answers provided by the jury, makes its own findings in the judgment, and the dispute concerns a legal issue, we review the ruling de novo. *See* ***Hall v. Hubco, Inc.***, 292 S.W.3d 22, 27-28 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

When the trial court's judgment deviates from the jury verdict, and the complaining party alleges that the evidence is legally insufficient to support the findings in the trial court's judgment, we employ the well-settled legal sufficiency or "no evidence" standard of review. *See* ***Tiller v. McLure***, 121 S.W.3d 709, 713 (Tex. 2003); *see also* ***Hall***, 292 S.W.3d at 27-28. The evidence is legally insufficient when (1) the record discloses a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or rules of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of a vital fact. ***City of Keller v. Wilson***, 168 S.W.3d 802, 810 (Tex. 2005). In determining whether there is legally sufficient evidence, we must consider evidence favorable to the finding if a reasonable factfinder could and disregard evidence contrary to the finding unless a reasonable factfinder could not. ***Id.*** at 807, 827.

Applicable Law

"It is 'universally recognized' that—'without aid of language in the deed, and indeed sometimes in spite of such language'—the circumstances surrounding an owner's conveyance of part of a previously unified tract of land may cause an easement to arise between the two new parcels." ***Seber v. Union Pac. R.R. Co.***, 350 S.W.3d 640, 647 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (quoting ***Mitchell v. Castellaw***, 246 S.W.2d 163, 167 (Tex. 1952)). There are two types of implied easements in Texas: easements implied by necessity and easements implied by prior use. *See* ***id.*** at 648.

In this case, the relevant type is the implied easement by necessity. "It is well settled that where there is conveyed a tract of land which is surrounded by the grantor's land, or by his and

that of third persons, and to which the grantee can only have access to or egress from through lands other than that conveyed, the grantee has a right-of-way by necessity over the remaining lands of the grantor." ***Persons v. Russell***, 625 S.W.2d 387, 390 (Tex. App.—Tyler 1981, no writ) (quoting ***Bains v. Parker***, 182 S.W.2d 397, 399 (Tex. 1944)). An implied easement by necessity may be created when the conveyed or retained parcel cannot be accessed except by traveling over the remaining tract of land. *See* ***Koonce v. Brite Estate***, 663 S.W.2d 451, 452 (Tex. 1984). A party seeking an easement by necessity must show (1) unity of ownership of both parcels prior to separation, (2) access across the servient parcel is necessary and not a mere convenience, and (3) the necessity exists at the time of severance. ***Id.***

Although unity of ownership is required for easements by necessity, the relevant time to determine unity of ownership is when the easement was allegedly created, that is, at the time of severance when the grantee purchased the property. *See* ***S & G Associated Developers, LLC v. Covington Oaks Condo. Owners Ass'n, Inc.***, No. 08-10-00192-CV, 2012 WL 292905, at *4 (Tex. App.—El Paso Feb. 1, 2012, no pet. h.) (citing ***Ingham v. O'Block***, 351 S.W.3d 96, 101 (Tex. App.—San Antonio 2011, pet. denied)). Likewise, necessity is determined at the time of severance. See ***id.*** (citing ***Ingham***, 351 S.W.3d at 101).

The degree of necessity required to establish an implied easement depends on whether the easement arises by implied reservation or by implied grant. *See* ***Houston Bellaire, Ltd. v. TCP LB Portfolio I, L.P.***, 981 S.W.2d 916, 921 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (citing ***Mitchell v. Castellaw***, 151 Tex. 56, 246 S.W.2d 163, 168 (Tex. 1952) (implied reservation); ***Howell v. Estes***, 71 Tex. 690, 12 S.W. 62, 63 (Tex. 1888) (implied grant)). A party claiming implied easement by grant must establish reasonable necessity, in contrast to a party claiming easement by reservation, who must establish strict necessity. *See* ***id.*** "The degree of 'necessity' required to establish an easement by implied grant is merely such as renders the easement necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made." ***Fender v. Schaded***, 420 S.W.2d 468, 472 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.).

However, the reasonable necessity determination should be applied with great caution. ***Parker v. Bains***, 194 S.W.2d 569, 576 (Tex. Civ. App.—Galveston 1946, writ ref'd n.r.e.). For example, implied easements by necessity are typically recognized only for economic or physical

necessities, and not for uses that are merely desirable or recreational. *See* ***Cummins v. Travis Cnty. Water Control & Improvement Dist. No. 17***, 175 S.W.3d 34, 52 (Tex. App.—Austin 2005, pet. denied) (citing ***Drye v. Eagle Rock Ranch, Inc.***, 364 S.W.2d 196, 207 (Tex. 1963)). "The way of necessity must be more than one of convenience. For, if the owner of the land can use another way, he cannot claim by implication to pass over land of another to get to his own." ***Daniel v. Fox***, 917 S.W.2d 106, 111 (Tex. App.—San Antonio 1996, writ denied).

An easement by necessity is temporary; it continues only so long as the necessity exists and terminates upon the cessation of the necessity. ***Bains***, 182 S.W.2d at 399. Although an easement by necessity terminates when the necessity ceases, this does not mean that the grantor has the authority to pick and choose which route the grantee can use. ***S & G Associated Developers,*** 2012 WL 292905, at *8 (citing ***Seber***, 350 S.W.3d at 649). Once the location of an easement by necessity is established, it cannot be changed without the consent of both parties. ***Id.*** (citing ***Samuelson v. Alvarado***, 847 S.W.2d 319, 323 (Tex. App.—El Paso 1993, no writ)).

Discussion

The trial court's charge likely confused the jury. Question No. 1 specifically asked the jury to make a finding on the necessity element. Question No. 3 asked the jury to make a finding on whether the land touched Crown's land or Crown's land and that of third parties. However, the instruction included in Question No. 1 subsumed this issue. The jury ultimately answered "Yes" to Question No. 1, but answered "No" to Question No. 3, creating an apparent conflict. In addition, the court asked the jury about the unity of ownership element in Question No. 2, and the jury answered that there was no unity of ownership. This answer negates an essential element of Durrett's claim. Nevertheless, the trial court ultimately disregarded the jury's answers to Questions No. 2 and No. 3, and gave effect to its answer to Question No. 1. In doing so, the trial court implicitly concluded either that Question No. 1 contained all the elements for an easement by necessity, or alternatively that the remaining elements existed as a matter of law.

As we have stated, we review the trial court's judgment in this circumstance under the no evidence standard. *See* ***Tiller***, 121 S.W.3d at713; ***Spencer***, 876 S.W.2d at 157; ***Hall***, 292 S.W.3d at 27-28. The Durrett tract was not surrounded by Crown Pine's land or that of Crown Pine and third parties, a necessary element of his claim. Rather, Durrett's own property (the Northern tract) touched the Durrett tract, which is the land he purchased from Crown Pine.

Consequently, Durrett's ownership of the land to the north prior to his transaction with Crown Pine defeats his claim for an easement as a matter of law. *See* ***Persons***, 625 S.W.2d at 390 (stating land purchased must be "surrounded by the grantor's land, or by his and that of third persons" in order to give rise to easement by way of necessity).

In addition, Temple Inland severed the sixty-nine acre Temple tract into two separate tracts when it sold the seventeen acre SRA tract to the SRA in 1964. When Crown Pine acquired the remaining two tracts, they had already been severed from each other. Even though Crown Pine owned both tracts when it sold the twenty-one acre Durrett tract to Durrett, it did not own both tracts as a unit. Therefore, the evidence shows as a matter of law that there is no unity of ownership at the relevant time. *See* ***id.*** (stating that land sold must be part of contiguous unit in order to give rise to easement by necessity for unity of ownership purposes).

Finally, Durrett did not acquire the Southern tract until after he closed the transaction on the Durrett tract. Therefore, at the relevant time period—the time of sale—there was no necessity for an easement, because an easement would have led to land he did not own. *See* ***id.*** (stating if two tracts are separate and not contiguous, it would serve no useful purpose to grant easement since buyer would have no way of reaching easement without going across other land owned by strangers).

Based upon our review of the record, we conclude that there is no evidence to support the jury's answer to Question No. 1. We further conclude that the jury's answers to Question No. 2 and No. 3 are supported by legally sufficient evidence, and the trial court erred in issuing a judgment in which it disregarded those findings. Accordingly, Crown Pine's first issue is sustained.

ATTORNEY'S FEES

In its second issue, Crown Pine contends that since a declaratory judgment should have been granted in its favor, the trial court should have awarded Crown Pine its attorney's fees. Crown Pine asks that this court render judgment for allegedly stipulated attorney's fee amounts, or alternatively that we remand to the trial court so that it may reconsider the appropriate amount of fees to award.

The trial court has discretion to award reasonable and necessary attorney's fees as it deems equitable and just under the Declaratory Judgment Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West 2008). To grant or deny attorney's fees in a declaratory judgment action lies within the discretion of the trial court, and its judgment will not be reversed on appeal absent a clear showing that it abused that discretion. ***Oake v. Collin Cnty.***, 692 S.W.2d 454, 455 (Tex. 1985). In the exercise of its discretion, the trial court may decline to award attorney's fees to either party. ***SAVA gumarska in kemijska industria d.d. v. Advanced Polymer Scis., Inc.***, 128 S.W.3d 304, 324 (Tex. App.—Dallas 2004, no pet.). A prevailing party in a declaratory judgment action is not entitled to attorney's fees simply as a matter of law; entitlement depends on what is equitable and just, and the trial court's power is, in that respect, discretionary. ***Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Util. Dist.***, 198 S.W.3d 300, 319 (Tex. App.—Texarkana 2006, pet. denied).

We have sustained Crown Pine's first issue, reversed the trial court's judgment, and rendered judgment that Durrett has no easement in the property at issue. Given this disposition, it is appropriate to remand this cause to the trial court so that it may determine the amount of attorney's fees, if any, to award to the parties under the Declaratory Judgment Act.[3] *See* ***Robertson v. City of Austin***, 157 S.W.3d 130, 136-37 (Tex. App.—Austin 2005, pet. denied) (holding that dispute over easement was not trespass to try title claim and could therefore be brought under Declaratory Judgment Act because easement is nonpossessory property interest; consequently, attorney's fees are available in trial court's discretion).

Crown Pine's second issue is sustained.

DISPOSITION

We ***reverse*** the judgment of the trial court, ***render*** judgment that Sammy Durrett has no implied easement by way of necessity across Crown Pine Timber 1, L.P.'s land, and ***remand*** the

[3] Even though Durrett apparently stipulated that the amount of fees incurred by Crown Pine were reasonable, there are other factors a trial court should consider in awarding fees in Declaratory Judgment Act cases. *See, e.g.*, ***Bocquet v. Herring***, 972 S.W.2d 19, 20-21 (Tex. 1998); ***Scottsdale Ins. Co. v. Travis***, 68 S.W.3d 72, 77 (Tex. App.—Dallas 2001, pet. denied).

case for a determination of what amount of attorney's fees, if any, should be awarded to the parties.

BRIAN HOYLE
Justice

Opinion delivered May 9, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(PUBLISH)