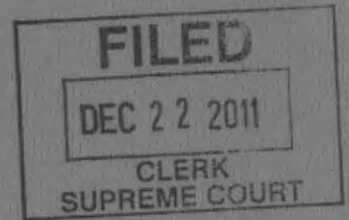


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2010-SC-000678-D
(2009-CA-000671-MR)



JOHN AND ELIZABETH SAWYERS

APPELLANTS

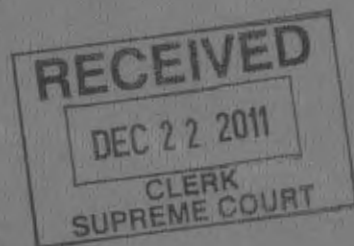
vs

APPEAL FROM ALLEN CIRCUIT COURT
CIVIL ACTION NO 07-CI-00108

ARTHUR AND JOYCE BELLER

APPELLEES

BRIEF ON BEHALF OF APPELLANTS, JOHN and ELIZABETH SAWYERS



Respectfully Submitted,

JAMES T. KELLEY
The Kelley Law Offices
115 W Poplar Street
Elizabethtown, KY 42701
270-769-2368
Counsel for Appellants

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief on Behalf of Appellants, John and Elizabeth Sawyers, was served upon the following via First Class Postage Prepaid Mail: Honorable Janet Crocker, Allen Circuit Court, 201 W. Main Street, Scottsville, KY 42164, and Steven O. Thornton, Attorney for Appellees, 1011 Lehman Avenue, Suite 102, Bowling Green, KY 42103.

This 20 day of December 2011.

JAMES T. KELLEY

I. INTRODUCTION

This case is an appeal from the Allen Circuit Court granting the Appellants an easement across the Appellees property but placing restrictions on the use and maintenance of the easement which the Appellants believe are unreasonable and contrary to the law of the Commonwealth of Kentucky.

II. STATEMENT CONCERNING ORAL ARGUMENTS

The Appellants believe that their position has been adequately set forth in this brief, so no oral argument is being requested.

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MAY IT PLEASE THE COURT;

STATEMENT OF FACTS

The appeal to this Honorable Court is from a decision of the Allen Circuit Court recognizing that John and Elizabeth Sawyers have the right of access to their property across property belonging to Arthur and Joyce Beller pursuant to a deed in the Sawyers chain of title giving a previous property owner in the Sawyers chain of title a passway easement for a road across property now owned by Bellers, but restricting the rights of the Sawyers as to their use and maintenance of said road.

By order of this Court entered on October 20, 2011, the Sawyers motion for discretionary review was granted in respect to the issue regarding restrictions on the maintenance and use of the passway easement that was awarded to the Sawyers by the Allen Circuit Court.

Specifically, the judgment of the Allen Circuit Court, a copy of which is found in the Appendix as Exhibit 3, found that the Sawyers had an express easement for a road over the Bellers through a deed dated 1881 and found of record in Deed Book T, Page 528, in the office of the Clerk of the Allen County Court. (Appendix, Exhibit 3, Judgment, Page 11, R.O.A., Page 273)

This deed simply states that the grantor, James T. Gibson, Jr., is conveying to the second parties, the Fishback Heirs, "the right-of-way for a road on the northeast end of the land that the first said party now lives on the boundary of said road is to be 16' from a certain fence...." A copy of this deed is found in the Appendix as Exhibit 5.

The Bellers denied that the Sawyers had the right to use this road, which is still in existence, so the Sawyers brought suit to have their rights in this roadway determined.

After trial, the trial court found that the Sawyers, "shall be permitted to use the Fishback Passway for the Plaintiffs' personal non-commercial access to the back of their property, and that the Plaintiff shall have a duty to maintain the Fishback Road for the limited purpose of making it passable for their vehicles and farm equipment, but shall not be permitted to pave, rock or otherwise materially change the current condition of the road." (Appendix Exhibit 3, Page 13)

The Sawyers then moved the Court to alter, amend or vacate the portion of the judgment relating to these restrictions. By subsequent order of the trial court entered on May 27, 2009, the Court overruled the Sawyers' motion, but states that it is clarifying its judgment against any commercial use of the easement to the extent that the Plaintiffs (Sawyers) and their successors in title could use the easement for farming operations and could place gravel on the road for the limited purpose of filling potholes in order to make the easement passable. (Appendix Exhibit 4, Order Overruling Plaintiffs' Motion for a New Trial or to Alter, Amend or Vacate)

To back track somewhat, historically the portion of the property that this road served was a separate farm known as the Fishback Farm.

In the 1970's, this farm was consolidated with other farms to create one large farm of several hundred acres, which the Sawyers now own. (Trial Exhibits 27 and 47, deeds to A.M. Manning)

After consolidation, the Fishback farm was used almost exclusively for farming operations and hunting. (CD #49-08 - CD-085: Wade Manning: 02:27:03, 7-31-08)

However, according to the testimony of Wade Manning and John Whitney, who were a prior owners in the chain of title to Sawyers, the road was graveled and kept up so that cattle trucks could move cattle to and from the farm. (CD #49-08-CD-084, Wade Manning: 02:27:03, John Whitney: 01:53:34, Rodney Ward: 00:29:37, John Bull: 00:45:49 [07-31-08])

The Sawyers objected to the trial court's restrictions on the use and maintenance of the passway and appealed to the Court of Appeals of Kentucky, which, in a divided opinion, upheld the decision of the trial court.

The Sawyers then filed a motion for discretionary review regarding several issues, and this Court ruled favorably upon the Sawyers' Motion For Discretionary Review as it relates to the restrictions placed upon the use and maintenance of the passway.

ARGUMENT

I. THE RESTRICTIONS PLACED UPON THE SAWYERS' RIGHT TO THE USE AND MAINTENANCE OF THE EASEMENT GRANTED TO THEM WERE CLEARLY ERRONEOUS AND VIOLATES THE SAWYERS LAWFUL RIGHT TO THE REASONABLE USE OF THEIR EASEMENT AS AFFORDED TO THEM UNDER KENTUCKY LAW.

The easement that we have before us is an express easement granting the Fishbacks and their successors a road so that they would have access to their farm. There was no restrictions placed upon their use of the road by the instrument creating this grant, which was created by the deed from James T. Gibson, Jr. to the Fishback heirs, as found of record in Deed Book T, Page

528, in the office of the Clerk of the Allen County Court. (Appendix, Exhibit 5)

The highest court of Kentucky seems to make a distinction between easements created by prescription and those that are expressed. Prescriptive easements are limited by the purpose for which they are acquired and the use to which they are put. Campbell vs Winchester Realty Company, Ky App, 294 S.W. 2d 919 (1956)

Express easements are construed to be a general way for all purposes to which the land to be accommodated by the way may naturally or reasonably be devoted. Newberry vs Hardin, Ky. App, 248 S.W. 2nd 427 (1952)

As to easements reserved in a general way in a deed, the rights retained by the dominant tenant are those necessary for reasonable and proper enjoyment of the easement. Blair vs City of Pikeville, Ky. App., 384 S.W. 2d 65, appeal after remand 457 S.W. 2d 474 (1964)

The Kentucky Appellant Courts have historically held that the use of an easement by the dominant tenant must be reasonable and as little burdensome to the land owner as the nature and purpose of the easement will permit. Com., Department of Fish and Wildlife Resources vs Garner, Ky. App., 896 S.W. 2d 10 (1995)

The cases throughout hold that the dominant tenant must use the road in a reasonable manner, but, unfortunately, like beautiful, reasonable is in the eye of the beholder, and there is very little authority as to what specifically can or cannot be done.

However, the case of Elam vs Elam, Ky. App., 322 S.W. 2d 703 (1959) held that the dominant tenant is not restricted to just right of passage, but can improve the passway by constructing a road.

What was the nature and purpose of the road in this case?

It was to provide access to a family farm from a public highway.

Clearly, this would envision travel over the road with current modes of transportation by the owners of the farm, their guest and business invitees, and the use of the farm for agricultural purposes including the taking of produce to market, and the maintaining of the road in such a fashion so as to make the road usable.

There was no restrictions in the deed from Gibson, Jr to the Fishback heirs against graveling the road or taking other actions needed to keep the road in a proper and usable condition according to existing or future standards.

The Sawyers believe that they should have the right to use their easement for the intended purpose, which was general access to their property, and to be able to maintain the road in a reasonable fashion according to modern standards.

Again, ones opinion of reasonable may differ from another, but if the Sawyers are not able to at least gravel the road, then the road is going to be a mud road which is not going to be usable during periods of extensive rain, as we frequently have in Kentucky, particularly in the Spring, and although the lower court judgment permits the filling of potholes, the rest of the road is going to be a quagmire at periods of time and difficult to use or continuously washing out.

Surely, when this easement was created, the creator of the easement by giving the Fishbacks a passway for a road must have assumed that all normal rights and uses going with a road would accompany that grant, to include the construction of a road and the use and maintenance of the road as any other family farm road would be used and maintained.

Although there was no paved roads in 1881, in 2011 it cannot be argued that the paving of this road is unreasonable.

Although the Fishback farm is currently part of a larger farm and is being used primarily for agricultural purposes, what if the Sawyers wanted to sell the farm to someone else and the

new owners elected to build a nice home on the property. Could they not pave the road? What would be unreasonable about that?

Somewhat ironically, the trial court judgment states, on page 13, that the Plaintiffs have a duty to maintain the Fishback road for the limited purpose of making it passable for their vehicles and farm equipment, but then says that they cannot gravel or pave the road.

How are they going to maintain it if they cannot gravel or pave it?

Basically, what you have now is a dirt road.

Is it reasonable to restrict the Sawyers to a dirt road which will be continually rutted out during periods of hard rain, and made impassable for periods of time throughout the year?

Surely the servient tenant would expect that a road servicing property would be maintained with gravel or paved.

All that the Sawyers have ever asked, is they be permitted to have a serviceable road, just like any other driveway leading to anyone else's home in Allen County.

Kentucky Law has historically recognized that as times change, the definition of reasonableness may change as well.

As the Court held in the case of Cameron vs Barton, Ky. App., 272 S. W. 2d 40 (1994), "As the passing of time creates new needs and 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 ancient modes of travel."

The Courts have even recognized that where there has been a normal development in the use of the dominant estate, the dominant estate may be granted additional uses and reasonable deviations in the use of an easement that was not even contemplated at the time of the creation.

Cincinnati, N.O. and TP RY. Company vs Barker, Ky. App., 247 S.W. 2d 943 (1951)

So it would seem that the parties today would have the right to anticipate changes which would allow the Sawyers or their successors in title to pave this passway if they chose to do so.

The Sawyers also complained about the fact that the existing gate at the end of the easement is 12' wide, whereas their granted easement is 16' wide.

The lower court permitted a gate to exist at the end of the road and granted the Sawyers the right to a key to the gate, and the Sawyers are not arguing against this finding that the Bellers should have the right to maintain a gate, but as the Sawyers have a 16' easement, the Sawyers do argue that the gate should be at least 16' in width, so as to permit them the full use of their granted easement.

The last complaint that the Sawyers had to the lower court judgment concerns the blanket restriction against any commercial use of the passway, except for agricultural purposes.

The Sawyers at this time have no intention for using their property for any commercial purpose other than agricultural, but nobody knows what the future holds. What if the Bellers sold their property for a commercial purpose and the surrounding area became commercial?

Why could not this road then be used for some type of commercial purpose?

As previously pointed out in Barton, supra, and Barker, supra, times change and the uses that may be made of an easement change, but this road, if the judgment is allowed to stand, could never be used for any type of commercial use other than agricultural, even though the surrounding area became commercial.

This may be an extreme example, but to make a blanket prohibition against all types of commercial use other than agricultural is short sided and contrary to Barton, supra, and Barker, supra. Furthermore, there could be non-agricultural commercial activities on the Sawyer property that would not create any significant burden to Bellers.

Someone could build a house on the Fishback farm and have a beauty salon in the basement, which would not generate any more traffic than if the Sawyers had a pumpkin patch and allowed people to use the road to come upon the Sawyers' property to buy pumpkins, which would be an agricultural use, or to use the farm to sell Christmas trees, which would be a commercial agricultural use.

Obviously, specific uses that could be made of an easement change with the times and can be only determined on a case by case basis, and to restrict a road to any specific activity is shortsighted and is a dangerous precedent to all citizens of the Commonwealth of Kentucky.

On a broader perspective, and from a public policy viewpoint, if someone is granted a passway easement, or if it is acquired by prescription, the servient tenant must realize that although the servient tenant may have the fee simple ownership of the surface over which the passway goes, still the servient tenant must recognize the right of the dominant tenant to have reasonable use of the passway as a mode of travel, and this would clearly imply the right to construct a road and to maintain same.

This was clearly recognized in the case of *Elam v. Elam*, supra, on page 705 of the opinion where the court said as follows:

“The conveyance of the right of way unquestionably gave the grantee, not only a right to an unobstructed passage at all times over the defendant's land, but also all such rights as were incident or necessary to the enjoyment of such right of passage. *Bliss v. Greeley*, 45 N.Y. 671; *Maxwell v. McAtee*, 9 B.Mon., Ky., 21. The grantee thus acquired the right to enter upon the land, and construct such a roadbed as he desired, and to keep the same in repair. He could break up the soil, level irregularities, fill up depressions, blast rocks, and not only remove impediments, but supply deficiencies, in order to constitute a good road. He had a right to exclude strangers from its use and to restrict such use of it by the owner of the servient tenement as was inconsistent with the enjoyment of his easement.”

Surely, the servient tenant knows that he cannot obstruct the passway and could never

grow crops or really have very much use of the passway thereafter, other than the right to travel on the passway unless that right was restricted.

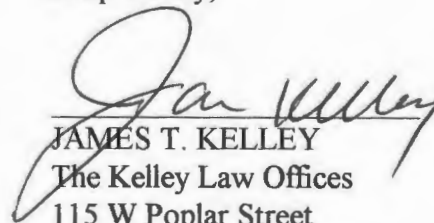
In this case, the Fishback farm has merged with other farms and is no longer a family farm, but the granted passway still exist and there was no expiration date on the grant.

As to any passway that is created through a general grant of ingress and egress, it is reasonable to impose on the servient tenant the right for the dominant tenant to construct and maintain a road, and no restrictions against graveling or paving or maintenance should be allowed as a matter of law, unless the servient tenant could demonstrate some unusual and specific harm that would not ordinarily be anticipated from the use of a passway.

CONCLUSION

The Sawyers believe that they should be allowed to gravel or pave the right-of-way if they choose to, that the existing gate across the road should be removed and replaced with a 16' wide gate, and that if the Bellers choose to lock the gate, that the Sawyers be given a key, and that the blanket restriction against any type of commercial activities should be set aside.

Respectfully,



JAMES T. KELLEY

The Kelley Law Offices

115 W Poplar Street

Elizabethtown, KY 42701

270-769-2368

Counsel for Appellants