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COURT OF APPEALS

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

FILED
MAR 08 2012
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SUPREME COURT

JOHN AND ELIZABETH SAWYERS

APPELLANTS

vs

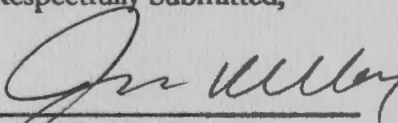
**APPEAL FROM ALLEN CIRCUIT COURT
CIVIL ACTION NO 07-CI-00108**

ARTHUR AND JOYCE BELLER

APPELLEES

REPLY ON BEHALF OF APPELLANTS, JOHN and ELIZABETH SAWYERS

Respectfully Submitted,

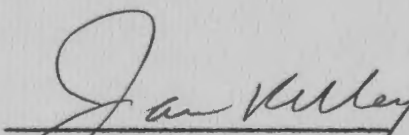


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CERTIFICATE OF SERVICE

This is to certify that 10 copies of the foregoing Reply Brief on behalf of Appellants was served upon Mr. Samuel P. Givens, Jr., Clerk, Kentucky Supreme Court, 360 Democrat Drive, Frankfort, KY 40601, via First Class Return Receipt Postage Prepaid Mail, and a true and exact copy was served upon the 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, following via First Class Postage Prepaid Mail.

This 6 day of March, 2011.



JAMES T. KELLEY

STATEMENT OF POINTS AND AUTHORITIES

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I. THE TRIAL COURT DID WAS NOT CLEARLY
ERRONEOUS AND DID NOT VIOLATE ANY
RIGHTS HELD BY THE APPELLANTS..... 1

Dept. of Fish & Wildlife Res's v. Gamer,
896 S.W. 2d 10 (Ky. 1995) 1

Higdon v. Kentucky Gas Transmission Corp.,
488 S.W. 2d 655 (Ky. 1969) 1, 3

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APPEAL FROM ALLEN CIRCUIT COURT
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MAY IT PLEASE THE COURT;

ARGUMENT

I. THE TRIAL COURT DID WAS NOT
CLEARLY ERRONEOUS AND DID NOT
VIOLATE ANY RIGHTS HELD BY THE
APPELLANTS.

The Appellees cite two cases in their brief in support of their position. Dept. of Fish & Wildlife Res's v. Garner, 896 S.W. 2d 10 (Ky. 1995); Higdon v. Kentucky Gas Transmission Corp., 448 S.W. 2d 655 (Ky. 1969).

However, neither of these cases support the Appellees argument that the lower court did not abuse its discretion in not permitting the graveling of the passway or failing to order the removal of a 12 to 14 foot wide gate on a 16' wide easement or restricting any commercial use of the property.

The Gardner case, supra, related to the right of the immediate family to have access to a cemetery, and there is nothing in that case that indicates that a court has the absolute right to place restrictions on an easement, whether arbitrary or not.

The Higdon case, supra, regarding an analyses of the correlative rights and duties existing between the dominant tenant and servient tenant pointed out on Page 656 of the opinion, that each

case must be decided on the particular facts of each case.

In the case sub judice, the court ordered that the appellants shall keep the passway within reasonable state of repair, but then orders that graveling of the passway is not permitted, except to fill in potholes as they are created.

On Page 2 of the Appellees Brief, it is pointed out that there was no testimony that the passway would be impassable without gravel, but reasonable inferences from the evidence are permitted, and it is reasonable to infer that to allow a passway to remain a dirt road is going to create a condition making the road impassable during periods of severe rain and storms, as often happens in Kentucky, particularly during the spring.

The Appellees then make the statement that the gate crossing the entrance where the Bellers' property joins the Appellees property to the rear is only a 14' gate, but there is no evidence in the record to support this self serving and incorrect statement.

In truth, the gate is 16'.

Regardless, the granted easement that the Appellants was awarded is 16' in width, and although the Appellants are not disputing the right of the Appellees to maintain a gate at the entrance of the passway, the Appellants do believe the gate should be 16' in width in order to accommodate modern day farm equipment and to afford them the full use of their granted easement.

The Appellees argue that to increase the width of the gate would place an undue burden on the Appellees, without giving any specific reason why a 16' wide gate as opposed to a 14' wide gate would unduly burden the Appellees, particularly since the easement of the Appellants is 16' in width.

The Appellees on page 3 in their brief argue that the Appellants have raised a "bundle of speculative scenarios" as justification for the trial courts restrictions on the Appellants easements, as

the trial court should not be “permitted to, attempt to see in the future as to what or what not occur.”

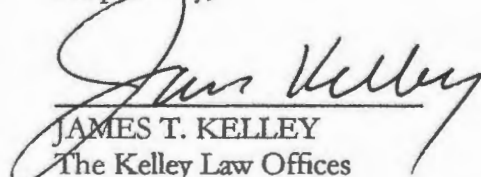
This underscores the thrust of the Appellants’ argument that the lower court acted arbitrarily in placing restrictions on the passway, because the trial court had no way to know the future and to place restrictions on the passway at this point in time was an abuse of discretion, just like the Court of Appeals found the trial court’s change of the width of the easement in the Higdon case, supra, to be unjustified as the increase in the width of the easement was a permanent restriction and there was no evidence the restriction was needed.

Regarding this particular easement, it was given for the purpose of granting to the dominant tenant a passway over the servient tenant’s property so that the dominant tenant would have access to a public road.

This easement was 16’ in width and without any restrictions.

Presumably, the servient tenant in granting the easement would have intended that the dominant tenant would use the passway in a similar and like manner as everyone else would use a road to their house, and although this easement was given over a century ago, it could be presumed that the dominant tenant would acquire a usable easement and would be permitted to construct a road, gravel the road, and use and maintain the road as other property owners would maintain and use a passway to their home.

Respectfully,



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