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COURT OF APPEALS

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2010-SC-000678-D
(2009-CA-000671-MR)

FILED
FEB 24 2012
CLERK
SUPREME COURT

JOHN AND ELIZABETH SAWYERS

APPELLANTS

v.

APPEAL TAKEN FROM ALLEN CIRCUIT COURT
CIVIL ACTION No. 07-CI-00108

ARTHUR AND JOYCE BELLER

APPELLEES

RESPONSE BRIEF ON BEHALF OF APPELLEE

CERTIFICATE OF SERVICE

This is to certify that ten originals of the Response Brief on Behalf of Appellees were mailed via United States Registered Mail, postage prepaid, to the following: Mr. Samuel P. Givens, Jr., Clerk, Kentucky Supreme Court, 360 Democrat Drive, Frankfort, Kentucky 40601. True and accurate copies of the Response Brief on Behalf of Appellees were mailed via United States Mail, postage prepaid, to the following: Mr. James T. Kelley, Counsel for Appellants, 115 West Poplar Street, Elizabethtown, Kentucky 42701 and The Honorable Janet Crocker, Judge, Allen Circuit Court, 201 West Main Street, Scottsville, Kentucky 42164.

This 20th day of February 2012.

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SUPREME COURT



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COUNTERSTATEMENT CONCERNING ORAL ARGUMENT

The Appellees believe that oral argument is unnecessary in this case.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

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COUNTERSTATEMENT OF THE CASE

This review involves only one issue: whether the trial court acted appropriately in placing certain restrictions on the Appellants' use of an easement over the Appellees' property. The Court of Appeals found that the trial court's action was not erroneous. The Court of Appeals agreed. This Court will find nothing in the record which would support the Appellants' arguments herein.

ARGUMENT

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

The Appellants argue that the trial court committed error in its findings and disposition regarding their rights to the Fishback Passageway. The trial court had before it ample evidence upon which it based its findings and restrictions on the Appellants' use of the Fishback Passageway. The trial court made it clear that it would not impose a burden on the Appellees by overextending the Appellants' rights to use of the passageway. See 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).

The Appellants claim that they should be permitted to gravel the passageway in order to use it; however, there was no testimony to indicate that the passageway would be impassable if it remained as is. The only reason the Appellants would need the passageway graveled would be for continuous and heavy traffic over it, or likely some use other than personal use. Similarly, the Appellants complain about the width of the gate at the entrance to the passageway, claiming that they would be unable to move farm equipment through the existing gate. The gate is now 12 to 14 feet wide, as is the gate of the Appellants' own gate at the end of the roadway. The only expression of a 16-foot gate is in the 1860s' burned deed when mention is made of the gate being sixteen feet from a fence. As the trial court acknowledged, boundaries change over time and landmarks become difficult to accurately ascertain. The Appellants are fully satisfied with a 12 to 14-foot gate at the end of the roadway onto their property; therefore, the width of the gate at the entrance to the passageway should be similarly satisfactory.

Increasing the width of the gate would place an undue and unnecessary burden on the Appellees, an action the trial court was within its discretion to limit. Stegman v. City of Fort Thomas, 116 S.W.2d 649 (Ky. 1938); Dept. of Fish & Wildlife Res's, *supra*.

The trial court was within its discretion to require the passageway to be maintained as it has been and to require the Appellants to make no commercial use of the passageway. The Appellants have presented no case law or precedent to indicate that the trial court did not have the right to rule in the manner it did. The trial court held that the Appellants could make personal use of the passageway. The Appellants once claimed to want nothing more; however, they now simply claim there should be no problem with their use of the passageway for commercial purposes if they so choose. The trial court was within its discretion to place reasonable restrictions on the Appellants' use of the Fishback passageway.

The Appellants have now raised before this Court a bundle of speculative scenarios in which they might wish to use the easement for one purpose or another. None of this speculation was entered at trial in the form of evidence, either testamentary or documentary. The trial court and the higher courts cannot be expected to, nor are they permitted to, attempt to see into the future as to what might or might not occur. The trial court placed reasonable restrictions on the Appellants' use of the easement, none of which restrictions were shown by the evidence to hamper the Appellants' claimed intended use of the easement. This Court should not now permit the Appellants to obtain additional rights based merely on the Appellants' request.

This 20th day of February 2012.



STEVEN O. THORNTON