

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-001572-MR

DAVID WILLOUGHBY AND  
TERESA WILLOUGHBY

APPELLANTS

v. APPEAL FROM MONTGOMERY CIRCUIT COURT  
HONORABLE BETH LEWIS MAZE, JUDGE  
ACTION NO. 99-CI-90035

CHARLES JONES

APPELLEE

OPINION  
AFFIRMING IN PART,  
REVERSING IN PART AND REMANDING

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BEFORE: EMBERTON, CHIEF JUDGE, BUCKINGHAM, AND PAISLEY, JUDGES.  
BUCKINGHAM, JUDGE: David and Teresa Willoughby appeal from an order of the Montgomery Circuit Court entered following a hearing for David Willoughby to show cause why he should not be held in contempt of court for his failure to comply with a previous court order. We affirm in part, reverse in part, and remand.

The Willoughbys and Charles and Nancy Jones<sup>1</sup> lived next door to one another on Strother Street in Mt. Sterling for a number of years. In the mid-1990's the Mt. Sterling Urban Renewal and Community Development Agency initiated a development project in their neighborhood. This project included rebuilding or renovating properties on the street. As a part of the project, the Willoughbys and the Joneses deeded their property to the agency. The agency rebuilt the Willoughbys' burned-out home and renovated the Joneses' home. Thereafter, the agencies reconveyed the properties to their respective owners.

In establishing the property lines, the Willoughbys received all of their former lot and a portion of the Joneses' lot on the east side and a portion of the neighboring lot on the west side. However, the Joneses were given a five-foot easement along the east side of the Willoughbys' new lot "for ingress, egress, and parking vehicles." This easement was on a common driveway the parties had shared in the past. The Willoughbys and the Joneses each had another driveway on the other side of their respective properties. Although the Willoughbys and the Joneses had lived amicably next to each other for many years and had peacefully shared the easement area as a common driveway before the agency project, the easement reservation in the

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<sup>1</sup> Although Nancy Jones was a party to the circuit court case, she was not named as an appellee herein.

Willoughbys' deed and the paving of a portion of the easement precipitated a dispute.

The problems with the use of the easement led the Joneses to file a complaint in the Montgomery Circuit Court against the Willoughbys, claiming that Mr. Willoughby was intentionally obstructing the use of the easement. On April 2, 2001, the circuit court entered an order determining that each party could use the property covered by the easement as long as neither restricted the other's use. Specifically, the order stated, "The Defendants shall have the right to use said easement, provided that such use does not interfere with the use of the Plaintiffs. Any use of the easement by the Defendants which interferes with Plaintiffs use of the easement shall be punishable as contempt of this Court." The order was final and appealable, and neither party appealed the order.

Unfortunately, problems between the parties continued. Due to further complaints by the Joneses that Willoughby was continuing to obstruct their use of the easement, the court ordered Willoughby to appear for a hearing and show cause why he should not be held in contempt for violating the prior order. A hearing on the show cause order was held on July 13, 2001. Following the hearing, the court entered an order directing the Joneses to retain a surveyor to paint a division line on the concrete driveway and to place stakes in the line of the

easement "which extends a parallel line five feet to the west of the division line." The court directed that the cost of the survey be shared by the parties. The court also ordered Willoughby to pay the Joneses' attorney \$150 as his fee for the hearing. Additionally, the court admonished Willoughby not to obstruct the easement so as to block the Joneses' right of ingress or egress. The court further warned that any violation of the order would constitute contempt of court. This appeal by the Willoughbys followed.

The Willoughbys' first argument is that the trial judge was biased against them. We have reviewed the transcript of the show cause hearing. It was apparent that the dispute between the parties had escalated to the extent that law enforcement officers were called to the scene on several occasions. The judge referred to the situation as one in which there was "almost a killing everyday." As for the involvement of law enforcement officers, the court stated, "[t]hat's got to stop."

The transcript of the hearing also reveals that Mr. Willoughby continued to refuse to accept the earlier court order determining the easement. Although he did not appeal from that order, he nevertheless continued to dispute it. It was apparent that the judge intended to end this dispute between the parties, at least as far as the involvement of law enforcement officers

and the court was involved, at that hearing. It is understandable that the judge would want to do that.

We perceive no bias on the part of the circuit judge from the record. To the extent the judge may have been somewhat impatient in dealing with the parties concerning this matter, such impatience was warranted. In fact, the judge stated that both parties were "overly sensitive." We perceive only an attempt by the judge to end this dispute, once and for all, and we do not conclude that she was biased against the Willoughbys.

Along this same line, the Willoughbys assert that the judge should not have given the Joneses the right to retain a surveyor to mark the appropriate line or lines. In response to this argument by the Willoughbys, the Joneses state on last page of their brief that "[t]he only relief available to appellants would seem to be that this Court direct the trial court to select a surveyor other than to use one of appellees' choosing." This statement appears to be an acknowledgement by the Joneses that the circuit court should have selected the surveyor rather than allowing the Joneses to do so. Had the court done this, there would have been no question concerning the impartiality of the surveyor. Thus, we reverse this part of the order and remand the matter for the judge to appoint the surveyor to establish and mark the line or lines.

The Willoughbys' second argument is that they were denied the right to present evidence. Having reviewed the transcript, we note that the judge allowed Mr. Willoughby to make a complete statement. We do not see that he was denied the right to call witnesses. On page 28 of the transcript, he requested the court to "reopen the case." The judge was within her discretion in not granting this request. Furthermore, Willoughby does not state what witnesses, if any, were present in the courtroom and ready to testify on his behalf. In short, we reject his argument that he was denied the right to present evidence.

The Willoughbys' third argument is that their property has been subjected to "illegal seizure." Because the Willoughbys did not appeal the original order, they are precluded from now raising the issue.

Finally, the Willoughbys claim they were denied a fair trial. First, the proceeding before the judge was not a trial. Rather, it was a hearing for Mr. Willoughby to show cause why he should not be held in contempt for violating the court's prior order. Again, having reviewed the transcript of the hearing, it does not appear to us that Willoughby was denied a fair hearing. The court simply did not accept his testimony and tended to believe the testimony of Jones and his witnesses. It has long been the law in Kentucky that the matter of the credibility of

the witnesses is for the fact finder, the judge in this case, to determine. Adkins v. Mead, Ky., 246 S.W.2d 980 (1952).

In addition to appealing the circuit court's order following the show cause hearing, the Willoughbys also request this court to order that the venue of the case be moved to another county if further legal proceedings must be held in connection with the case. Also, the Willoughbys ask this court to order that future subpoenas or legal documents not be served on Mr. Willoughby at his work. Finally, the Willoughbys seek \$250,000 in monetary damages. None of these matters were raised in or decided by the circuit court. Thus, this court is without authority to review the issues on appeal. Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225, 228 (1989).

The order of the Montgomery Circuit Court is affirmed in part and is reversed in part and remanded with directions to the court to appoint a surveyor to mark the division line rather than allow the Joneses' attorney to retain the surveyor.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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