

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000077-MR

KELLY BARD AND  
FAYE BARD, WIFE

APPELLANTS

v. APPEAL FROM TRIGG CIRCUIT COURT  
HONORABLE BILL CUNNINGHAM, JUDGE  
ACTION NO. 00-CI-00097

LARRY L. STEVENS;  
BARBARA STEVENS, WIFE; AND  
TRIGG COUNTY, KENTUCKY

APPELLEES

OPINION

VACATING AND REMANDING

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BEFORE: DYCHE, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from a judgment in a boundary line dispute action finding that appellants' driveway and retaining wall were on appellees' property. Appellants argue that the trial court erred in failing to consider a forty (40)-foot easement over appellees' property. From our review of the record, we agree that the trial court erred in failing to

determine whether appellants' driveway and retaining wall were within said easement. Accordingly, we vacate the judgment and remand the matter for further proceedings consistent with this opinion.

Appellants, Kelly and Faye Bard (the "Bards"), and appellees, Larry and Barbara Stevens (the "Stevenses"), both own lakefront property in Cadiz. The Bards, who purchased part of their property in 1972 and part in 1999, own property on the west side of Piney Woods Road, a road owned and maintained by Trigg County. The Stevenses, who acquired their property in 1997, own two lots east of Piney Woods Road partly across from the Bards' property, and one odd-shaped, long and narrow lot west of Piney Woods Road that shares a common boundary with the southeast portion of the Bards' property. The Stevenses acquired this lot on the west side of Piney Woods Road via a quitclaim deed dated August 28, 1997. This property contained an easement described as follows in the deed:

The above described property is subject to the rights of others for the installation, operation and maintenance of:

. . .

2. A 40 foot easement along the west line of the property herein described.

In February of 2000, the Bards began constructing a retaining wall and driveway leading to Piney Woods Road. The

Bards allege that the Stevenses then attempted to interfere with construction of the driveway by ordering their excavator to discontinue work. It was the Stevenses' position that the driveway and retaining wall were being built on their property. The Stevenses further asserted that the retaining wall and driveway interfered with the view from their home and also caused water to be diverted onto their property. The Bards maintained that the driveway was located within the right-of-way of Piney Woods Road. In the alternative, the Bards contended that the driveway was located on the public easement described in the Stevenses' quitclaim deed. Ultimately, the retaining wall and driveway were completed, including the installation of a culvert by the county.

As a result of the ongoing dispute over the driveway and retaining wall, the Bards filed a complaint against the Stevenses, alleging interference with contractual relations with their excavator and trespass for entry onto the Bards' property to destroy a fence. The Bards sought compensatory and punitive damages as well as an injunction preventing any action relative to property within the easement and the right-of-way. The Stevenses counterclaimed, alleging that the driveway was constructed on their property and seeking damages for the erosion caused by construction of the driveway.

On November 20, 2001, a bench trial was held on the matter. On December 6, 2001, the trial court entered judgment in favor of the Stevenses, finding that the right-of-way for the county road was fifteen (15) feet on either side of the centerline of the road, that the Stevenses' property did not fall within the fifteen-foot right-of-way, and that the Bards' driveway did not fall within this fifteen-foot right-of-way. The court went on to award the Stevenses \$400 in damages for the diversion of water onto their property from the driveway construction. In its findings and judgment, the court made no mention of the forty (40)-foot easement in the Stevenses' deed. This appeal by the Bards followed.

The sole issue before us on appeal is whether the trial court erred in failing to consider the forty (40)-foot easement in making its findings. Specifically, the Bards claim that had the trial court considered the undisputed evidence regarding this easement, it would have found that the Bards' driveway was within this easement and, thus, the Stevenses would have had no standing to challenge its construction.

A trial court's findings in a boundary line dispute case will not be set aside on appeal unless they are clearly erroneous. Croley v. Alsip, Ky., 602 S.W.2d 418 (1980); CR 52.01. The principal evidence regarding the forty (40)-foot easement was the quitclaim deed to the Stevenses which was

offered as an exhibit at trial. There was no evidence disputing the existence of this easement.

Besides the trial court's finding that, as a matter of law, the right-of-way of the county road was thirty (30) feet, the trial court appeared to base its decision on the testimony of the court-appointed surveyor, Randall Cruse, that the Bards' retaining wall and driveway crossed over onto the Stevenses' property. However, on cross-examination, Cruse admitted that he was unaware of the existence of the forty (40)-foot easement in the Stevenses' deed until it was pointed out by the Bards' attorney at trial. Cruse also admitted that the only portion of the Stevenses' property in question which appeared to be greater than forty (40) feet was the northernmost portion, which would have been well north of the Bards' property.

An easement is a right to use in some manner land of another for a specific purpose. Inter-County Rural Electric Co-op. Corp. v. Reeves, 294 Ky. 458, 171 S.W.2d 978 (1943). An easement may be created by express written grant, implication, prescription or estoppel. Grinestaff v. Grinestaff, Ky., 318 S.W.2d 881 (1958). From our review of the quitclaim deed to the Stevenses, it appears that the Stevenses' property was subject to the forty (40)-foot easement in gross. See Inter-County Rural Electric Co-op. Corp. v. Reeves, 171 S.W.2d 978. There was no evidence disputing the existence or legitimacy of this

easement. Further, although we make no judgment herein regarding the Bards' rights as to this easement, from our review of the survey and plat of the properties at issue, it appears there is a strong possibility that the Bards' driveway and retaining wall may be within this easement (forty (40) feet of the west line of the Stevenses' property). Accordingly, we believe the trial court's findings were not supported by substantial evidence in that the court failed to at least consider this undisputed and highly relevant evidence.

For the reasons stated above, the judgment of the Trigg Circuit Court is vacated and the cause remanded for further proceedings consistent with this opinion.

DYCHE, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING: I respectfully dissent.

The trial court's findings of fact are not clearly erroneous and should be affirmed.

The Majority Opinion states that the trial court erred by failing to determine whether appellants' driveway and retaining wall were within the 40-foot easement, and that its failure to consider "this undisputed and highly relevant evidence" caused its findings to be clearly erroneous since they were not supported by substantial evidence. In my opinion there was substantial evidence of record to support the trial court's

findings and the appellants' proof was insufficient to compel a finding in their favor. The mere reference in the Stevenses' deed to a 40-foot easement along the west line of their property does not constitute evidence which would compel the fact-finder to find in the Bards' favor. The trial court was well within its authority to reject the appellants' position and to find in favor of the appellees.

BRIEF FOR APPELLANT:

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Jason E. Holland  
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BRIEF FOR APPELLEES, LARRY L.  
STEVENS AND BARBARA STEVENS:

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