

RENDERED: JULY 18, 2003; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001086-MR

BUFORD CARTER MALCOMB
and SHIRLEY MALCOMB

APPELLANTS

v.

APPEAL FROM OWEN CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 99-CI-00151

JAMES C. MALCOMB

APPELLEE

OPINION AND ORDER
DISMISSING

** ** * * * **

BEFORE: COMBS and McANULTY, Judges; MILLER, Senior Judge.¹

COMBS, JUDGE: This is an appeal from a judgment which enforced a settlement agreement resulting from the mediation of a property dispute among relatives. The action originally concerned the use of a long-existing roadway that once serviced a family farm in Owen County, Kentucky. It has evolved into a boundary line dispute. After examining the record and considering the arguments of counsel, we regretfully are compelled to dismiss the appeal on procedural grounds.

¹Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The appellants, Buford Carter Malcomb and Shirley Malcomb, own a tract of farmland (Tract 15) sandwiched between two tracts owned by the appellee, James C. Malcomb, and his wife, Juanita Malcomb (Tract 14 and Tract 16). It is uncontested that for more than 50 years, there has been a roadway along the property boundary between Tract 14 and 15 and that this roadway -- after running approximately 1,880 feet along the boundary between Tract 14 and Tract 15 -- turns and bisects Tract 15 for the distance of approximately 400 feet in order to provide access to Tract 16.

Buford and Shirley refused to permit James and Juanita to utilize the roadway bisecting Tract 15 in order to access Tract 16. Therefore, James alone filed a lawsuit alleging that he was entitled to cross his cousin's property by virtue of an easement appurtenant to his property. Juanita was joined several months later as a party-plaintiff. In their answer to the complaint, Buford and Shirley denied that James was entitled to the easement. In the alternative, they contended that they were entitled to utilize that portion of the roadway running along the boundary between Tract 14 and Tract 15 in order to access their Tract 15.

After a period of discovery, the parties filed cross-motions for summary judgment. The court denied these motions and set the matter for trial. Before the scheduled trial date, the court ordered the parties to participate in mediation. The mediation proved successful -- at least initially. It produced a

settlement agreement that was executed by the parties on November 10, 2000.

According to the agreement, Buford and Shirley granted to James and Juanita a:

right of way along a now existing road extending from lands owned by [James and Juanita] for a distance of approximately 435 feet to other lands owned by [James and Juanita], on and over a certain piece of land, owned by [Buford and Shirley]. The now existing road referred to herein is eighteen (18) feet wide. . . . Deed of Easement recorded December 1, 2000 in Deed Book 197, Page 17.

In exchange, James and Juanita granted to Buford and Shirley:

a right of way from Kentucky Highway 227 along a now existing road for a distance of approximately 1,880 feet to the lands of [Buford and Shirley] on and over a certain piece of land owned by [James and Juanita]. The now existing road referred to herein is eighteen (18) feet wide. . . ." Deed of Easement recorded November 30, 2000 in Deed Book 196, Page 780.

This settlement agreement was incorporated into the trial court's judgment entered March 13, 2001; that judgment was not appealed.

When Buford began to construct a fence along the boundary line between Tract 14 and Tract 15, a new dispute developed. Buford erected the first fence post near the center of the old roadbed. James and Juanita immediately moved for a restraining order pursuant to Kentucky Civil Rules (CR) 65.03. According to James and Juanita, the placement of the fence obstructed the roadway, violated the parties' settlement agreement, and disregarded the court's judgment of March 13,

2001.

There has never been a dispute concerning the fact that a visible roadbed ran along the boundary between Tract 14 and Tract 15. However, no survey had been conducted to establish its exact placement with respect to the tracts. Buford and Shirley argued that they believed that the roadbed over the first 1,880 feet of the easement was located entirely on Tract 14 -- property belonging to James and Juanita. Therefore, they reasoned that the entire eighteen-foot width of the newly granted easement should also be located entirely on Tract 14. James and Juanita disagreed and contended that the eighteen-foot wide easement was to be established at nine feet to either side of the centerline of the existing roadbed according to the agreement.

In April 2001, the court ordered that a survey be conducted. It particularly ordered the court-appointed surveyor to show the property line between Tract 14 and Tract 15 and to make note of a proposed line at nine feet to either side of the centerline of the roadbed. There were no objections.

Following a review of the survey and a full hearing, the trial court concluded that the roadbed meandered periodically across the boundary line of Tract 14 and Tract 15. Nevertheless, the court ordered that the easements should be established at nine (9) feet to either side of the centerline of the well-defined roadbed as it appeared physically.

Buford and Shirley filed a motion to alter, amend, or vacate pursuant to CR 59.05, a motion for new trial, and a motion

for specific findings of fact. After another full evidentiary hearing in March 2002, the trial court denied the motions. This appeal followed.

On appeal, Buford and Shirley argue that the trial court erred by establishing the location of the easements and boundary lines as it did because the orders were based upon an ambiguous settlement agreement. We do not agree. Our review of the merits of this case convinces us that the trial court did not err in its careful and patient resolution of this ongoing controversy. However, we are compelled to turn our decision on procedural rather than substantive grounds. We conclude that Buford and Shirley have failed to join an indispensable party to the appeal.

The appellants' notice of appeal designates James C. Malcomb as the sole appellee. Contrary to the requirements of CR 73.03, Juanita was not designated by name as an appellee. Her interests in the disputed boundaries and easements were also adjudicated and determined by the court's final order.

Upon its filing, a notice of appeal transfers jurisdiction of a case from the circuit court to the appellate court. Clark Equip. Co., Inc. v. Bowman, Ky. App., 762 S.W.2d 417 (1988). It places the named parties within the jurisdiction of the appellate court. City of Devondale v. Stallings, Ky., 795 S.W.2d 954 (1990). Because the notice of appeal filed in this case transferred jurisdiction of only the named parties to the court of appeals, we do not have jurisdiction over Juanita

Malcomb. We believe that she is a necessary party with respect to any proceedings before us.

The appellants have failed to designate Juanita Malcomb as a party to this appeal. As her absence from the proceedings prevents the court from granting complete relief among those already named, she is an indispensable party. Therefore, we are precluded from considering the merits of the appeal. See Braden v. Republic-Vanguard Life Ins. Co. Ky., 657 S.W.2d 241 (1983). Therefore, her absence from the appeal is an omission fatal to the proceedings. R.L.W. v. Cabinet for Human Resources, Ky. App., 756 S.W.2d 148 (1988).

IT IS HEREBY ORDERED that the appeal be dismissed.

ALL CONCUR.

/s/ Sara W. Combs
JUDGE, COURT OF APPEALS

ENTERED: July 18, 2003

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Paul C. Harnice
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Phillip Shepherd
James W. Shepherd
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Phillip Shepherd
Frankfort, Kentucky