

RENDERED: NOVEMBER 10, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001125-MR

ARTHUR L. FULLERTON AND
DOTTIE A. FULLERTON, HIS WIFE;
AND KERMIT EARL JORDAN AND
JUDY KAYE JORDAN, HIS WIFE

APPELLANTS

v. APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
CIVIL ACTION NO. 02-CI-00020

MERRILL DEAN OSBORNE AND
KAREN LOUISE OSBORNE, HIS WIFE;
AND MERRILL DEAN OSBORNE AND
MARY E. OSBORNE, HIS WIFE

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: MINTON AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.¹

MINTON, JUDGE: The owners of a right-of-way easement that
crossed a pasture brought a declaratory judgment action in

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

circuit court asking the court to resolve a dispute over the erection of a fence to keep the livestock grazing in the pasture from wandering upon the easement. The circuit court ruled that the owners of the easement could fence the easement at their own expense. They argue on appeal that the circuit court erred by requiring them to pay the cost of the fencing. Upon review of the record and the relevant case law, we find no abuse of discretion in the circuit court's decision. Therefore, we affirm.

FACTUAL SUMMARY

The underlying facts of this case are not in dispute; therefore, we adopt the circuit court's summary as follows:

In 1979[,] the plaintiff, Arthur L. Fullerton, and the Defendant, Merrill Osborne, joined in an agreement to purchase and split between them, a tract of farmland lying along Kinniconick Creek in Lewis County, Kentucky. Mr. Fullerton acquired the residence constructed by a former owner, Mr. Harry Boone Nicholson, located on the property. The rest of the land was owned, in fee, by the defendant, Mr. Merrill Osborne. Mr. Osborne has used his property to graze cattle since he acquired the property in 1979.

Mr. Fullerton's deed contained the following language:

Further, Grantors hereby give, grant and release unto Grantees, their heirs and assigns, an easement and right-of-way over the private road leading from Ky. 1149

into the real property hereby conveyed for the Grantees, their heirs and assigns, and their agents, servants, tenants, visitors and licensees to freely pass and repass on foot or in vehicle of any description, across and upon said private road for all lawful purposes necessary, incident or proper to the use and enjoyment of the real property hereby conveyed.

Mr. Fullerton accessed his residence by way of this private road described above.

In 2002, the plaintiff, Arthur Fullerton, conveyed to Kermit Jordan approximately ten (10) acres of land out of the tract he had obtained in 1979, which contained the identical easement language in the deed to Fullerton. Mr. Jordan purchased the land to build a log cabin camp house where he could take his family and grandchildren for peaceful camping retreats. Mr. Jordan ran electric [sic] to his property, and constructed a septic system for the log house he intends to build someday. It is necessary for the defendants, Jordan and Fullerton, to use the private road to access their property.

Mr. Osborne keeps his cattle on his property. From time to time, the cattle obstruct the private road making it necessary for anyone traveling on the private [road] to wait until the cattle pass. From time to time[,] the cattle urinate on the road, cow feces is deposited [on] the road, and occasionally, it becomes necessary to wait until the cows or bulls are finished with their "business" before a motorist can pass. Also, Mr. Osborne feeds the cattle in an area close to the private road, and has a salt block and water source for the cattle in the same area. Mr. Osborne has not placed these items

intentionally to interfere with the plaintiff's use of the private road. In fact, Mr. Osborne has done nothing to prevent the plaintiffs from using the private road.

. . . .

The defendants proposed a solution to creating a [passway] unobstructed by cows, bulls, bovine feces and urine, and the like. Mr. Osborne explained that a fence of any kind would create problems for him. He testified that if gates are installed, they must be opened by two people—one to open the gate and keep the cattle from running through it, and the other person to drive the vehicle through the gate. Mr. Osborne also explained that any gate at all would make it more difficult to corral [sic] the cattle when he was ready to take them to market. Mr. Osborne also objected due to the terrain of his property. The upper side consists of a rather steep hill with drainpipes or ditches on one side of the private road. On the lower side of the private road is [Kinniconick] Creek. If the plaintiffs build a fence on both sides of the private road, it would severely restrict access to the upper side since Mr. Osborne would be unable to run a tractor across the upper side due to the intermittent streams and gullies that a tractor cannot traverse.

Fullerton and his wife, Dottie A. Fullerton, and Jordan and his wife, Judy Kaye Jordan, are the "dominant tenants" with regard to the right-of-way easement. Osborne and his wife, Mary E. Osborne, are the parents of Merrill Dean Osborne, who is married to Karen Louise Osborne. The Osbornes are the collective "servient tenants." Dottie and Mary are

sisters, and Judy Kaye is their niece; therefore, this is a property dispute among family members.

THE ACTION IN CIRCUIT COURT

The Fullertons and Jordans asked the Osbornes to erect fencing and gates to keep the cattle off of the easement but the Osbornes refused. So the Fullertons and Jordans filed a complaint and a petition for a declaration of their rights in the Lewis Circuit Court. They alleged that the Osbornes' cattle were roaming "loose . . . in the roadway" and creating "a serious problem for the Plaintiffs and their visitors, especially because of the corrosive action of cow manure on new cars and trucks." The Fullertons and Jordans stated they believed "a combination of fencing and cattle guards" could be "devised that will keep cattle off the roadway while not being seriously burdensome to [the Osbornes'] use of their property." They requested the court issue a declaratory judgment establishing their right to erect fencing and cattle guards and their right to "costs herein expended."

Attempts at mediation proved fruitless. Two years later, on the day of the trial, the Fullertons and Jordans filed an amended complaint. The amended complaint was almost identical to the original; but in their demand for relief, the Fullertons and Jordans demanded "a Judgment requiring the

Defendants to pay the costs of fencing and installing cattle guards . . . or, in the alternative, to pay such share of the costs as the Court may adjudge"

In the judgment, the court concluded that the Osbornes had not interfered with or obstructed the easement. The court further held that the Fullertons and Jordans could erect fences to keep the cattle off the road, so long as the improvements did not interfere with the Osbornes' "use and enjoyment of their grazing property for their cattle." The Fullertons and Jordans were ordered to construct the fencing in accordance with the court's "proposed configuration." They were also ordered to pay "100% of the costs of construction" and "100% of the costs of maintenance of the fence, cattle guards, and gates." This appeal follows.

ARGUMENTS ON APPEAL

The Fullertons and Jordans assert that the court erred as a matter of law in concluding that the Osbornes were not responsible for constructing and paying for the fence since the Osbornes' cattle were the source of the problem. They also argue the court erred in attempting to provide its own solution to the problem by requiring the parties to build the fence in accordance with the proposed configuration. We disagree.

BALANCING THE EQUITIES

Our review of a circuit court's conclusions of law on appeal is limited to whether there has been an abuse of discretion.² "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."³ Because the court made a declaratory judgment in this case, we will review the decision to determine whether the trial judge abused his discretion.

The rule of law with regard to the relationship between dominant and servient estates is well-settled. Servient and dominant owners have "correlative rights and duties which neither may unreasonably exercise to the injury of the other."⁴ Servient tenants are entitled to use their property in any lawful manner; but in doing so, "they cannot destroy the rights of the dominant estate created by the easement over their property."⁵ The servient tenant must allow the dominant tenant "the free and unrestricted use of the passway," and, in turn, "the owners of the dominant estate . . . must use their right so

² Miller v. Eldridge, 146 S.W.3d 909 (Ky. 2004).

³ Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 577 (Ky. 2000).

⁴ Higdon v. Kentucky Gas Transmission Corporation, 448 S.W.2d 655, 657 (Ky. 1969).

⁵ Sandman v. Highland, 312 Ky. 128, 226 S.W.2d 766, 768 (Ky. 1950).

as to be as little burdensome as possible to the servient estate."⁶

As found by the circuit court, the Osbornes had not obstructed the Fullertons' and Jordans' use of this easement. But in an attempt to balance equitably the interests of both sides in this family dispute, the court ruled that the Fullertons and Jordans could build a fence to keep the Osbornes' cattle off the passway, so long as the fence did not interfere with the Osbornes' reasonable use of their property. Therefore, the court ordered the Fullertons and Jordans to erect the fence in accordance with the court's "proposed configuration."

In essence, the trial court found that the Osbornes had done nothing wrong or improper. Furthermore, the trial court found that the Osbornes would derive no benefit from the erection of any fences or gates. Thus, the trial court required the Fullertons and Jordans to pay for the erection and maintenance of any fences or gates. Such a conclusion is legally and equitably sound because the Osbornes should not be financially responsible for fences or gates that are not necessitated by any wrongdoing on their part, especially since the fencing will be much more of a burden than a benefit to them.

⁶ *Id.*

Having determined that the trial court acted within its sound discretion when it ordered the Fullertons and Jordans to be financially responsible for the installation and maintenance of any fences and gates, we now turn to whether the trial court erred by specifying what type of fences and gates must be installed. The Fullertons and Jordans do not take issue with the soundness or efficacy of the trial court's design for the gates and fences. Rather, their sole argument is that the fencing mandated by the trial court is too expensive.

Appellants admit that the trial court heard testimony regarding the availability of several fencing options. Thus, the trial court merely chose the type of fencing that it believed would best resolve the Fullertons' and the Jordans' problems. Although the trial court's solution certainly was not the only one available, we cannot say that the court abused its discretion in choosing one type of fencing out of those presented at trial, especially in light of the fact that the Appellants seemingly concede that the trial court's design for the fences and gates would alleviate the problems associated with the cattle roaming freely on the road.⁷

⁷ It must also be noted that the Fullertons and Jordans are not obligated to build a fence at all. If they believe the economic costs of the fence outlined by the trial court outweighs the benefits they would receive from it, then they may forego fencing the roadway.

The trial court heard all of the evidence in this case and, based on that evidence, rendered a detailed opinion. Although the trial court's legal conclusions are not the only ones that could have been drawn from the evidence, they are supported by sound legal and equitable principles. Thus, the trial court's decision is not arbitrary, meaning that it must be affirmed.

For the foregoing reasons, the judgment of the Lewis Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

James D. Atkinson, Jr.
Greenup, Kentucky

BRIEF FOR APPELLEES:

E. V. Holder, Jr.
Vanceburg, Kentucky