

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-002266-MR

SANTA CRUZ CATTLE COMPANY, INC.,  
AND THEODORE DWENGER

APPELLANTS

v. APPEAL FROM HENRY CIRCUIT COURT  
HONORABLE KAREN A. CONRAD, JUDGE  
ACTION NO. 95-CI-00109

BLACK FOREST RIDING ACADEMY, LTD;  
CHEVALIER, INC.; AND HANS KALLENBERGER

APPELLEES

OPINION  
AFFIRMING IN PART,  
VACATING IN PART,  
AND  
REMANDING

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BEFORE: BUCKINGHAM, JOHNSON, AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: Santa Cruz Cattle Co., Inc., and Theodore Dwenger appeal from a final judgment of the Henry Circuit Court granting summary judgment to Black Forest Riding Academy, Ltd.; Chevalier, Inc.; and Hans Kallenberger. Because we believe there were unresolved issues, we affirm in part, vacate in part, and remand.

The appellants (hereinafter referred to as Santa Cruz) and the appellees (hereinafter referred to as Black Forest) occupy adjacent tracts of real property located in Henry County, Kentucky. The tract owned by Santa Cruz (Tract 2) is landlocked and relies on an access easement across the tract occupied by Black Forest (Tract 1). In order to understand the dispute between the parties, it is necessary to relate the history of the property.

The two tracts were once part of a single larger tract of land known as the Old Isolation Farm. That tract was owned by Kentucky Park, Inc. In 1985, Kentucky Park subdivided the single tract into two tracts. Later that year, it sold Tract 2 to L/K Ventures. Due to certain indebtedness of L/K Ventures, Tract 2 was sold at auction in 1992. Santa Cruz bought the property and continues to own it.

In 1988, Tract 1 (the tract occupied by Black Forest) was purchased from Kentucky Park by L'Esprit Kentucky Park, Ltd. In 1989, L'Esprit sold Tract 1 to John Bizzack, the owner of Bittersweet Arabians, Inc. Bizzack sold Tract 1 to Kemper/Stahl in 1992. In 1993, Chevalier, Inc., bought the tract from Kemper/Stahl. Chevalier is the current owner of Tract 1, and it leases the tract to Black Forest.

The 1985 deed of Tract 2 from Kentucky Park to L/K Ventures contained the following restriction:

The property hereby conveyed shall not, without the prior written consent of the owners of the adjoining property across which the easement referred to herein has been granted, be used for any purpose other than (i) the raising, training, breeding, propagation (including embryo transfer), treatment, care and "private treaty" sales of horses, (ii) the raising of agricultural products incident to a successful farm operation such as corn, grains and grass crops, and (iii) such living quarters as may be reasonably connected to those activities referred to in items (i) and (ii) hereof[.]

In addition to the deed restrictions, a water agreement between prior owners of the tracts is also relevant to this case. In 1991, Bittersweet Arabians and L/K Ventures entered into an agreement whereby Tract 2 would connect a water line to the water main supplying Tract 1. The agreement stated that the Henry County Water District would install a water meter on the line to Tract 2 and would deduct the amount of water shown on that meter from the amount charged to Bittersweet Arabians. L/K Ventures would then be obligated to pay the water district for the amount of the deduction.

Bittersweet Arabians' attorney memorialized the agreement and its limitations in a letter to L/K Ventures. The letter stated, in pertinent part, as follows:

Access to the water is granted to you alone and is non-transferable, non-assignable and is not to be construed as a permanent right. You hereby acknowledge that it is revocable at any time by [Bittersweet Arabians] with or without cause.

A representative of L/K Ventures signed at the end of the letter, indicating its agreement with the terms.

On July 19, 1995, Black Forest and Chevalier filed a civil complaint in the Henry Circuit Court against Santa Cruz and Dwenger for damages and injunctive relief.<sup>1</sup> The complaint alleged that Santa Cruz and Dwenger had trespassed upon the Black Forest/Chevalier property (Tract 1), had violated deed restrictions by placing cattle on the Tract 2 property owned by Santa Cruz, and had violated Kentucky laws and administrative regulations involving the health care of horses on the Tract 2 property, creating a high risk of infection upon the horses of Black Forest on Tract 1. Santa Cruz and Dwenger filed a counterclaim seeking to enjoin Black Forest and Chevalier from withholding water service to the Tract 2 property.

After Chevalier and Black Forest came into possession of Tract 1, they disapproved of the practice whereby Santa Cruz would either pay them for the amount of water consumed during each billing period or would pay the water district on Black Forest's behalf. Thus, in October 1996, Black Forest filed a complaint against Henry County Water District No. 2 with the Public Service Commission.

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<sup>1</sup> Dwenger owns Santa Cruz.

In an order dated August 4, 1998, the Public Service Commission found that the water district's actions were in violation of the rules and regulations governing water districts. As a result, the Commission imposed a fine on the water district. The Commission further stated that the question of the existence of an easement was one for the circuit court. The Commission directed that if such an easement for utility service was found to exist, then the water district should install a new service connector line from its main to the property line and meter of Santa Cruz. If no easement was found to exist, the water district was directed to extend service to Santa Cruz in a manner set forth in administrative regulations.

On February 4, 2000, the circuit court entered an order determining that the water district was a necessary party to the determination of whether or not an easement for a water line existed. The water district was then made a party defendant by an amended third-party complaint filed by Chevalier/Black Forest. The court thereafter entered an order setting the case for trial by jury on June 27, 2000.

The case was remanded from the trial docket, however, due to the trial of a criminal case. The court then entered an order setting a bench trial for March 14, 2001. Although the record does not indicate why, the case was not tried on that date either. On October 23, 2001, the court entered an order

directing Santa Cruz/Dwenger to file a summary judgment motion within 30 days and directing Chevalier/Black Forest and the water district to file responses within 20 days thereafter. The order stated that the case would then stand submitted on the issue of summary judgment.<sup>2</sup>

On October 31, 2003, the court entered a notice of its intent to dismiss the case pursuant to CR<sup>3</sup> 77.02(2) since there had been no activity in the case for two years. In December 2003, summary judgment motions were filed on behalf of Chevalier/Black Forest and on behalf of Santa Cruz/Dwenger. In late February 2004, the court entered summary judgment in favor of Chevalier/Black Forest.

The order directed that Santa Cruz/Dwenger remove all cattle and discontinue all residential uses of Tract 2 within 60 days from the entry of the order. The court also determined that there was no water line easement because the earlier agreement between Bittersweet Arabians and L/K Ventures had been revoked. The court directed that Santa Cruz/Dwenger had 60 days to make alternate water source arrangements.

Finally, the order stated that summary judgment was not appropriate on the trespass issue due to the insufficiency of testimony or evidence to determine the location of the

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<sup>2</sup> By this time, there was a different circuit judge.

<sup>3</sup> Kentucky Rules of Civil Procedure.

property line. Months later, on October 14, 2004, the court entered a final order that noted the claims not resolved by the previous order were dismissed by agreement. This appeal by Santa Cruz/Dwenger followed.

Santa Cruz's first argument is that the circuit court erred in not finding the existence of a water line easement. In determining that a water line easement did not exist, the court concluded that the agreement between Bittersweet Arabians and L/K Ventures was not enforceable but was revocable at any time. The court noted the language in the agreement which stated that the agreement was "non-transferable, non-assignable, and is not to be construed as a permanent right."

In response to Santa Cruz's argument, Black Forest argues that this court should not give it consideration because the water district is an indispensable party to the appeal but has not been named as an appellee. Black Forest relies on the circuit court's determination that the water district was a necessary party to any determination relating to the existence of a water line easement.

While there was no appeal from the court's order requiring the water district to be made a party to the circuit court action, we nevertheless conclude that the water district is not an indispensable party to this appeal. Complete relief between the appellants and the appellees may be accorded in the

absence of the water district. See CR 19.01. See also Braden v. Republic-Vanguard Life Ins. Co., 657 S.W.2d 241 (Ky. 1983), wherein the court stated, “[w]e do not interpret the rules as requiring joinder as an indispensable party to an appeal who is unnecessary to the decision of the appeal and who would incur an unnecessary expense if its presence was required.” Id. at 244.

Alternatively, Black Forest urges us to affirm the court’s determination that no water line easement existed. Easements may be created by express written grant, implication, prescription, or estoppel. Carroll v. Meredith, 59 S.W.3d 484, 489 (Ky.App. 2001). However, “[c]onnecting with utility lines situated upon another’s property is a privilege to use his land and does not create an interest in that land, and therefore, is nothing more than a license.” Carr v. Barnett, 580 S.W.2d 237, 241 (Ky.App. 1979). We agree with the circuit court that the agreement between Bittersweet Arabians and L/K Ventures did not create an easement.

However, the court’s order did not mention Santa Cruz’s argument that an easement by necessity exists due to its property (Tract 2) being landlocked. Since we are unable to determine if there is a fact issue concerning the existence of

an easement by necessity, we vacate and remand to the trial court for further proceedings on that issue.<sup>4</sup>

Santa Cruz's second argument is that the circuit court erred in finding the deed restrictions enforceable as to its property. As we have noted, the court found that Santa Cruz violated a deed restriction by raising cattle on the property. While Santa Cruz claimed it also raised horses on the property, it admitted it raised cattle as well.

Santa Cruz argues on appeal that the deed restriction was a personal covenant between Kentucky Parks and L/K Ventures and was not a covenant that ran with the land so as to be enforceable against it. Additionally, Santa Cruz argues that the deed restriction is unenforceable against it because it has been waived by Black Forest and its predecessors in title. In connection with this argument, Santa Cruz argues that there has been a change in the character of the neighborhood sufficient to render the restriction unenforceable and that the restriction is unenforceable due to a lack of privity between the parties.

In response to these arguments, Black Forest asserts that Santa Cruz did not raise the arguments to the circuit court and thus the arguments are not subject to appellate review by this court. In reviewing the applicable portion of Santa Cruz's

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<sup>4</sup> The prerequisites to create an easement by necessity are set forth in Carroll, 59 S.W.3d at 491.

summary judgment motion, we note that the entire argument relates to the applicability of L'Esprit Master Declarations of Easements, Covenants and Restrictions. As noted by Black Forest in its summary judgment motion, those restrictions have nothing to do with the Tract 2 property. In fact, Santa Cruz has not mentioned those restrictions on appeal, apparently conceding their irrelevance. In short, its arguments herein are completely different from those raised before the circuit court.<sup>5</sup>

"It is an elementary rule that trial courts should first be given the opportunity to rule on questions before those issues are subject to appellate review." Swatzell v. Commonwealth, 962 S.W.2d 866, 868 (Ky. 1998), overruled on other grounds by Rapier v. Philpot, 130 S.W.3d 560, 564 (Ky. 2004). Further, as noted by the Kentucky Supreme Court in Kennedy v. Commonwealth, 544 S.W.2d 219 (Ky. 1977), "appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court." Id. at 222. Because the arguments raised to this court on the deed restriction issue were not raised to the circuit court, we decline to address them as they are not subject to our appellate review.<sup>6</sup>

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<sup>5</sup> We note that Santa Cruz states in its brief that it fired its previous attorney and filed a bar complaint against her following the circuit court's order granting summary judgment to Black Forest.

<sup>6</sup> Santa Cruz did not dispute this point in its reply brief.

Santa Cruz's last argument is that the court erred when it directed Dwenger to discontinue all residential use of the property. As we have noted, the deed restriction allows "such living quarters as may be reasonably connected to" the activities involving horses and/or the raising of agricultural products, both of which were allowed by the restrictions. Santa Cruz argues that, regardless of cattle, it maintains a horse farm that is not prohibited by the deed restrictions. It contends that Dwenger is the caretaker for the horses and that his residence is incident to their care. Thus, it asserts that the residence is not in violation of the deed restriction.

Black Forest did not respond to this argument in its brief. Further, from our review of the court's order, it appears the court prohibited residential use because cattle was being raised on the property. No determination was made concerning whether the property was also used as a horse farm and, if so, whether the residence constituted "living quarters" as allowed by the deed restriction. On this issue, we must vacate and remand for further proceedings.

The judgment of the Henry Circuit Court is affirmed in part, vacated in part, and remanded.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Wendi Swinson Wagner  
Louisville, Kentucky

BRIEF FOR APPELLEES:

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