

RENDERED: MAY 12, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2005-CA-000408-MR

THEODORE PARKER II

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE STEVEN D. COMBS, JUDGE  
ACTION NO. 03-CI-00620

BONNIE MAYNARD and  
RALPH MAYNARD, HER HUSBAND

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

EMBERTON, SENIOR JUDGE: This appeal challenges a judgment that allowed the servient estate to relocate an easement existing for the purpose of ingress to the dominant estate. The trial judge premised his decision upon well-established case law holding that in situations where the deed establishes no particular path

---

<sup>1</sup> 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.

for the easement, the owner of the servient estate may change its location so long as the rights of the dominant estate are not materially impaired. Appellant argues in this appeal that the trial judge's findings as to the material impairment of his rights are palpably against the weight of the evidence and must be set aside as clearly erroneous. We disagree and affirm.

Appellant Theodore Parker II is the nephew of appellee Bonnie Maynard. Mrs. Maynard and her brother, appellant's father, were deeded adjoining property by their parents Bruce and Gertrude Parker in the late 1960's. Mrs. Maynard's deed contained the following reservation:

There is further excepted from this deed of conveyance a private driveway to serve the rest of the property and specifically to serve as ingress and egress to Theodore Parker's property.

Although that deed did not specify the location, beginnings or dimensions of the easement, it is undisputed that its purpose was to provide the Theodore Parker property access to Rocky Hollow Road, which runs along the front of both tracts. A small creek runs parallel to the road at the front of the tracts, separating them from the road. The Maynards' residence and a residence on the Parker tract sit side by side immediately in front of a steep mountain face. In 1998, Mr. Parker deeded his property to his son who utilized it as rental property.

Up until 2001 or 2002, the creek, which separates these properties from the road, crossed under Rocky Hollow Road at the bridge which had been located directly in front of the Maynards' residence. The easement had previously commenced at a point on Rocky Hollow Road immediately preceding that bridge, crossed in front of the Maynards' property, past the rental property and on to another piece of property. After the bridge was replaced by a drainpipe in the creek, Rocky Hollow Road became an uninterrupted lane of pavement. Theodore Parker Sr. subsequently placed a drainpipe in the creek immediately in front of the Maynards' property and filled it over with dirt.

Although both parties denied having connected this pipe to the road, Mr. Parker Sr. testified that he filled only the portion of the pipe closest to his property, leaving the creek side open. The Maynards also testified to having placed drain pipes on their property and filling them over with dirt. It is clear from photos in the record that the creek is no longer visible as it runs underground through these drainpipes and that both properties are now connected to Rocky Hollow Road at a point approximately 30 feet from the original easement entrance.

In May 2002, the Maynards' home was destroyed by a mudslide and they built a new home on the property. This new home is directly adjacent to the path the easement formerly

took, and in fact the former path of the easement makes up their entire front yard. During the period of constructing the new home, building materials and excavation dirt were placed on the original easement. There seems to be no controversy that during this time appellant Parker and his tenant had access to his property across the filled-in drainpipe his father had installed. It is also undisputed that delivery trucks equipped with cranes used this same access to bring building materials to the construction site. The litigation precipitating this appeal commenced when appellant sought an injunction to require the Maynards to remove a pile of construction dirt that remained on a portion of the old easement. The matter was ultimately tried before the trial judge for the purpose of settling the location of the easement and establishing the parties' rights to its use.

The trial judge specifically found that the relocation of the entrance to the easement has not resulted in a material inconvenience to the owner of the dominant estate, that adequate access to the property has been maintained, that the path of the original easement passes within two feet of the Maynards' residence, and that to require the easement to be placed at its original location would unnecessarily create two driveways, parallel and side-by-side. The trial judge's resulting conclusion that the commencement of the easement should be fixed

at the point where Parker Sr. installed the initial drainpipe resulted in this appeal.

Although appellant argues that these findings are clearly erroneous and that the record clearly established an unreasonable burden on the dominant estate by the relocation of the easement, the record fails to bear this out. It is so well-settled as to hardly require reiteration that this Court is without authority to usurp the trial judge's fact-finding function by substituting our view of disputed evidence for his. Clearly present in this record is evidence supporting the findings of the trial judge which must therefore be accorded deference on appeal.

Furthermore, the law is quite plain that the owner of a servient estate may alter the path of an easement not specifically located by deed so long as to do so does not materially impair the rights of the owner of the dominant estate.<sup>2</sup> We fully agree with the trial judge that appellant failed to demonstrate such material impairment by the relocation of the easement. In fact, it appears to us from reviewing the record that the actions of appellant's father and predecessor-in-title in installing the first drain pipe actually set the eventual relocation in motion.

---

<sup>2</sup> Texas Eastern v. Carmen, 314 S.W.2d 684 (Ky. 1964).

Accordingly, we find no error in the decision of the  
Pike Circuit Court and affirm the judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:

Larry R. Webster  
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Edward Atkins  
Pikeville, Kentucky