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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001813-MR

DELBERT BOGGS; AND
INA FAYE BOGGS, HIS WIFE — APPELLANTS

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE DANIEL SPARKS, JUDGE
ACTION NO. 04-CI-00198

RONNIE GRIFFITH; AND
PATRICIA GRIFFITH, HIS WIFE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON AND VANMETER, JUDGES; PAISLEY,[1] SENIOR JUDGE.

VANMETER, JUDGE: As a general rule, extrinsic evidence is inadmissible to alter the terms of an unambiguous document. The issue we must address in this case is whether the Lawrence Circuit Court correctly held that the conveyance of a "thirty foot width"

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

created a nonexclusive easement, based on the court's finding that the terms of the deed were ambiguous and its admission of the grantor's testimony that he intended to convey an easement. Finding no error, we affirm.

On or about January 5, 1991, Paul Ross executed and delivered to Delbert Boggs, Jr. a deed which permitted access to Boggs' property along a dirt road that transected Ross's property. The deed included the following language of conveyance:

> Lying and being on the Waters of Cain's Creek in Lawrence County, Kentucky, beginning at the colvert [*sic*] at the Otis Kelly Line, a thirty (30) foot width following the old road as close as possible, to the R.T. Berry property, thus crossing the Hubert Ross property.
> This being the same land conveyed to Paul Ross recorded in Deed Book 120 &123, pages 279 & 501 and in Will Book 4 & 5, pages 115 & 99, located in the Lawrence County Court Clerk's office.

Ross's property was subsequently conveyed to Millard Griffith in October 1992, and then to Ronnie Griffith in June 1998. The Ross/Griffith property hereafter is referred to as the Griffith property.

Boggs, Ross, and the Griffiths used the dirt road to access their respective properties without incident until Boggs erected a padlocked gate across the road, thereby restricting access to both his own and the Griffith property and creating the underlying dispute over the parties' respective rights to this road. The circuit court, adopting the master commissioner's recommendations, interpreted the deed as conveying a nonexclusive easement and enjoined Boggs from blocking the roadway. This appeal followed. We affirm.

Boggs first argues that the circuit court erred in admitting extrinsic evidence to determine his and Ross's intentions when they executed the deed. We disagree. The deed was prepared by Boggs' daughter under his supervision, and his signature appears on the deed as its preparer. The deed is on a printed form that is designed to convey a fee simple interest rather than an easement, and there are no allegations of ambiguities in the printed portion. However, the circuit court determined that the "typed-in" portion of the deed, describing the relevant property, is ambiguous because its language is more indicative of that which grants an easement than that which grants a fee simple interest. As a result of the ambiguous language, the court admitted parol evidence to establish Ross's and Boggs' intentions when the deed initially was executed.

Pursuant to CR[2] 52.01, "[f]indings of fact shall not be set aside unless clearly erroneous," and "[t]he findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court." A trial court's finding of fact is not clearly erroneous if supported by substantial evidence. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky.App. 2001). *See also Owens-Corning Fiberglas Corp. v. Golightly,* 976 S.W.2d 409, 414 (Ky.App. 1998).

Boggs relies on *Hoheimer v. Hoheimer,* 30 S.W.3d 176 (Ky. 2000), arguing that the trial court erred in allowing the use of extrinsic evidence in interpreting a deed. However, *Hoheimer* is not factually similar to the present case, as it involved parents who executed and delivered a series of unambiguous deeds conveying fee simple interests in

[2] Kentucky Rules of Civil Procedure.

their farm to their daughter. As the trial court concluded that the deeds clearly were not ambiguous, the supreme court reaffirmed that extrinsic evidence could not be used to alter the terms of the deed. Here, by contrast, even though Boggs correctly avers that extrinsic evidence cannot be introduced where the terms of the deed are not ambiguous, his argument fails because the terms of his deed are in fact ambiguous.

The deed below describes the conveyance as "following the old road as close as possible," thus giving no identification of specific boundary lines. The description calls for "a thirty (30) foot width," which is the statutory requirement for the width of a county road under KRS 178.040, and photos clearly indicate that the disputed property is a roadway lined by trees and brush. The term "road" is one which generally is used in easement conveyances. *See Mitchell v. Chance*, 149 S.W.3d 40, 46 n.7 (Tenn.App. 2004) (citing Jon W. Bruce & James W. Ely, Jr., *The Law of Easements & Licenses in Land* § 1:22 (2002)) (court stating that "[w]hen parties use terms such as 'right of way,' 'road,' or 'roadway' in a deed as a limitation on the use of land, courts should construe such language as strong, almost conclusive, evidence that the interest conveyed is an easement"); *see also Samples v. Smythe*, 32 Ky.L.Rptr. 187, 105 S.W. 415 (1907) (court stating that an easement, rather than a fee simple title, is conveyed when a deed transfers a "passway"). Further, the deed refers to the conveyed interest as "crossing" the Ross property. Generally, an easement "crosses" another's property while property that is owned in fee simple does not, and the use of the term "cross" infers that only a right of way has been granted across the land.

If a deed's language "is uncertain or ambiguous, [a court may properly consider] the situation of the parties, the objects which they had in view and the subsequent acts showing how it was construed." *Handy v. Standard Oil Co.*, 468 S.W.2d 302, 304 (Ky. 1971) (citing *Sword v. Sword*, 252 S.W.2d 869 (Ky. 1952)). Indeed, "[t]he fundamental rule in the construction of both wills and deeds is to give effect to the intention of the party executing the instrument, and this is to be arrived at by the language used in the entire writing." *Riley v. Riley*, 266 S.W.2d 109, 110 (Ky. 1954) (citing *Glocksen v. Holmes*, 299 Ky. 626, 186 S.W.2d 634 (Ky. 1945)). Because the language in the individualized "typed-in" portion of the deed appears to convey an easement, the circuit court correctly admitted extrinsic evidence in order to clear up the inconsistency between the "typed-in" portion and the printed portion.

Boggs correctly asserts that "[t]he intention of parties to a written instrument must be gathered from the four corners of that instrument." *Hoheimer*, 30 S.W.3d at 178. However, *Hoheimer* relies on *Riley*, 266 S.W.2d 109, wherein the Kentucky Supreme Court agreed with the appellees who urged that some effect must be given to all parts of a deed. In the case at bar, the circuit court did in fact follow the standards set forth in the cases cited by Boggs, concluding that since a standard printed form was used, the proper effect must be given to the typed portion which was actually written by the parties and thus was more indicative of their intentions. If an inconsistency or ambiguity exists between the printed and the individualized portions of a deed, the individualized portions will control, based on the rationale that words "specially

inserted are peculiarly indicative of true intent." 23 Am. Jur. 2d *Deeds* § 204 (2007). This rule of construction is especially important when lawyers are not involved in the transaction, as apparently was the case here. Giving the proper effect to all parts of the deed, the circuit court found ambiguity in the individualized, typewritten portion and correctly admitted extrinsic evidence to determine the intentions of the parties to the deed.

Boggs next contends that the circuit court erred by failing to interpret the deed as one granting a fee simple interest. The general rule is that a deed must be construed most strongly against the grantor and most favorably to the grantee. *Fay E. Sams Money Purchase Pension Plan v. Jansen*, 3 S.W.3d 753, 757 (Ky.App. 1999) (citing *Gabbard v. Short*, 351 S.W.2d 510, 511 (Ky. 1961)). However, this rule rests on the assumption that the deed is prepared by the grantor, who can select his own words and deliver the instrument to the grantee. *Witten v. Damron*, 300 Ky. 29, 187 S.W.2d 834, 836 (1945). In the present case, as the deed was prepared by Boggs as the grantee, the underlying rationale for the rule was removed. While no Kentucky case appears expressly to address this issue, this court has noted that other states have adopted the rationale that "where a deed is prepared by the grantee, the rule is reversed and any ambiguity is construed most strongly against the grantee[.]" *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593, 600 (Ky.App. 2006) (citing *Gladys City Oil, Gas & Mfg. Co. v. Right of Way Oil Co.*, 137 S.W. 171, 178 (Tex.Civ.App. 1911)). Although the deed involved in *Florman* was prepared by the grantor, this court suggested that the terms

of a deed would be construed "strongly against the preparers, whether that be the grantor or the grantees." *Id.* at 600. Similarly, the Indiana Supreme Court held that a deed prepared by a railroad grantee should be construed in favor of the grantor for the purpose of determining whether a fee simple estate or a mere easement was conveyed to the railroad. *Brown v. Penn Cent. Corp.*, 510 N.E.2d 641, 643 (Ind. 1987). It follows, in the case at bar, that the circuit court properly construed the deed's language most strongly against Boggs as the deed's grantee/preparer.

During the admission of extrinsic evidence to establish the parties' intentions, Ross testified that he intended to convey only an easement when he executed the deed, and that he did not intend to preclude the use of the easement by his successors in title, including Griffith. Further, the surrounding circumstances confirm that the transfer of an easement, rather than a fee simple interest, was intended by both parties. Both now and at the time the easement was granted, the road provided the only vehicular access to and across the Griffith property. When the Griffith property was owned by Ross, Boggs and Ross used the road concomitantly as if only a right of way had been granted by the deed. In these circumstances, it would be unreasonable to assume that Ross intended to convey the road across his property in fee simple, thereby effectively cutting his property in half and rendering it nearly unmarketable as a whole. Finally, the deeds conveying the Griffith property included no references to any conveyance to third parties of fee simple interests in any portion of the property. Thus, the circuit court did not err by interpreting the deed as granting only an easement.

Boggs also argues that the circuit court erred by ignoring the recording statutes. KRS 382.110(1) states:

> All deeds, mortgages and other instruments required by law to be recorded to be effectual against purchasers without notice, or creditors, shall be recorded in the county clerk's office of the county in which the property conveyed, or the greater part thereof, is located.

Contrary to Boggs' contention, the statute is not an issue in this case. Although the statute requires that deeds be recorded in order to be effectual and protected, it does not address the interpretation of deeds, which is the issue now before us.

Boggs next contends that the circuit court erred by failing to rule there was no landlocked property. However, whether the property is landlocked is irrelevant in this case. Although an easement by necessity across landlocked property may arise as determined by surrounding circumstances, rather than by deed, the instant case concerns only the interpretation of a deed and whether an easement exists thereunder.

Finally, Boggs argues that the circuit court erred by "failing to recognize public interest." This argument rests on the idea that Boggs should be responsible for access to the lake located on his property, and the gate simply served as a way to control public use of the lake. However, this argument also fails because a locked gate can still be placed across the road in question at the beginning of Boggs' property, thereby serving the stated purpose. The circuit court merely enjoined Boggs from placing the gate across any portion of the road which crosses the Griffith property.

The circuit court therefore did not clearly err by making the factual determination that the language in the deed is ambiguous, by admitting extrinsic evidence regarding the intentions of the parties to the deed, or by concluding that the deed granted a nonexclusive easement.

The circuit court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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