

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

NO. 2019-CA-001597-MR

TIMOTHY PENICK AND  
KATHY PENICK

APPELLANTS

v.

APPEAL FROM ALLEN CIRCUIT COURT  
HONORABLE JANET J. CROCKER, JUDGE  
ACTION NO. 18-CI-00087

TERRY SMITH AND  
KIM SMITH

APPELLEES

OPINION  
AFFIRMING IN PART,  
VACATING IN PART,  
AND REMANDING

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BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

COMBS, JUDGE: This is an action for declaration of rights concerning a dispute over an easement. Timothy Penick and his wife, Kathy Penick, appeal an order of the Allen Circuit Court authorizing Terry Smith and his wife, Kimberly Smith, to

keep a gate at the boundary separating the parties' adjoining tracts of real property. The gate obstructs a passway created for the benefit of the Penicks' real property. In its judgment, the trial court also dismissed the Penicks' tort claims against the Smiths. After our review, we affirm in part, vacate in part, and remand.

The Smiths acquired their property by deed dated October 17, 2001. Their property is essentially bisected by an express, right-of-way easement running from a county road through to the Penicks' property.

The Penicks acquired the tract adjoining the Smiths' property by deed dated January 27, 2017. Their roughly triangular parcel juts out into Barren River Lake. The right-of-way easement terminates at their property and provides them their only means of ingress and egress. That portion of the Penicks' property that does not adjoin the Smiths' property is bounded by the waters of Barren River Lake. The Penicks are the owners of the dominant estate; the Smiths are the owners of the servient estate.

On March 12, 2018, the Penicks filed a complaint against the Smiths. The Penicks alleged that after they acquired the dominant tract, the Smiths narrowed and obstructed the right-of-way with rebar, fences, gates, cement blocks, cables, posts, trash cans, wood, ditches, top soil, furniture, and other items. They alleged that the Smiths had continuously harassed them and impeded their use of the easement with vulgar language, obscene gestures, and the posting of

inappropriate signage over the passway. The Penicks sought an order restraining the Smiths from further obstructing or impeding their use and enjoyment of the easement and a declaration of rights with respect to its boundaries. In their answer, the Smiths admitted that their property was subject to the easement benefiting the Penicks' property. However, they asserted that their servient estate should be burdened as little as possible by the Penicks' use of the right-of-way.

In an amended complaint filed on August 14, 2018, the Penicks included claims for tortious interference with a legal right and harassment. The Smiths answered and denied the allegations. The Smiths contended that the amended complaint failed to state a claim upon which relief could be granted.

The matter was tried before the Allen Circuit Court on February 27 and 28, 2019. On September 24, 2019, the court entered a declaratory judgment directing the Smiths to "remove any obstacles within the easement" including any gate(s) "with the exception of the gate that has historically hung along the boundary line separating the two properties." The court concluded that it "shall be the responsibility of the Penicks and their invitees to keep the gate closed and fastened at all times." The court dismissed the Penicks' tort claims. This appeal followed.

On appeal, the Penicks first argue that the trial court erred by concluding that the Smiths may keep the disputed gate along the parties' boundary

line. They contend that the gate is unnecessary for the Smiths' use and enjoyment of their property and that it unreasonably interferes with their use and enjoyment of the passway. We agree.

We review the trial court's findings of fact to determine whether they are clearly erroneous. CR<sup>1</sup> 52.01. Findings of fact are clearly erroneous where they are not supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence is evidence of a probative value sufficient to convince a reasonable person to accept it as adequate to support a conclusion. *Id.* We must give due regard to the opportunity of the trial court to judge the credibility of the witnesses, and we must accept the trial court's findings that are supported by substantial evidence. CR 52.01.

The governing precedent provides that an owner of a servient estate (the Smiths) may not unduly obstruct the rights of the owner of a dominant estate (the Penicks) and that the owner of the dominant estate must use his rights so as to pose as little burden as possible upon the servient estate. *Sandman v. Highland*, 226 S.W.2d 766, 768 (Ky. 1950). Our courts have held expressly that an owner of a servient estate may erect gates across an easement as long as they do not interfere unreasonably with the use and enjoyment of the passway and "provided also they are necessary for the preservation and proper and efficient use of the [servient

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<sup>1</sup> Kentucky Rules of Civil Procedure.

estate], but not otherwise.” *Whitaker v. Yates*, 200 Ky. 530, 255 S.W. 102, 104 (1923) (citation omitted).

In its judgment, the trial court found that the Smiths’ gate at the boundary line served as a deterrent to potential trespassers and that it helped the Smiths to protect their dog kennel operations. However, in light of the testimony presented concerning the location of the gate in relation to the adjoining property and Barren River Lake along with the testimony concerning the nature of the Smiths’ dog kennels, we must conclude that these findings are not supported by the evidence.

Although the Penicks acknowledge that the Smiths generally have a right to exclude the public from their property, they contend that the gate across the easement at their (the Penicks’) boundary -- the terminus of the passway -- affects no one except the Penicks and their invitees. We agree.

The trial testimony indicates that the public is free to enter upon the Smiths’ property from the county road and to travel upon the entire length of the easement unimpeded until reaching the gate blocking ingress to the Penicks’ property. Consequently, the disputed gate does nothing to deter would-be trespassers from accessing the Smiths’ property; on the contrary, it serves only to block anyone attempting to reach the Penicks’ property. Moreover, the public cannot attempt to access the Smiths’ property from the Penicks’ property because

the remainder of the Penicks' property is bounded by Barren River Lake. The disputed gate, however, does interfere with the Penicks' use and enjoyment of the easement without being necessary for the preservation or proper and efficient use of the servient estate.

With respect to the Smiths' dog-breeding operations, the trial testimony indicated that the dog kennels are fully enclosed by fences upon the Smiths' property along either side of the passway. Consequently, the disputed gate does not help the Smiths to contain their dogs. Furthermore, because the easement remains otherwise unobstructed for its entire length, the disputed gate could not reasonably be part of any plan to rein in the dogs. The testimony concerning the dog kennels was simply gratuitous and irrelevant.

The Penicks contemplate daily use of the passway to access their home. Their unobstructed passage along the easement does nothing to burden the Smiths' use and enjoyment of the servient estate as the disputed gate does not appear to serve any legitimate or necessary purpose. The gate merely creates a barrier to the Penicks' full use and enjoyment of their property. Under these circumstances, the trial court's decision with respect to the gate cannot be affirmed. Because it interferes unreasonably with the Penicks' rights as owners of the dominant estate, the gate should be removed. We vacate on this issue and remand to the trial court for entry of an appropriate order.

Next, the Penicks argue that the trial court erred by dismissing their tort claims. They contend that the judgment should be reversed and that the case should be remanded for findings of fact and a decision on their claims for harassment and tortious interference with a legal right. We disagree.

In *Craft v. Rice*, 671 S.W.2d 247 (Ky. 1984), the Supreme Court of Kentucky recognized an individual's right to be free of emotional distress arising from the outrageous conduct of another. It adopted the Restatement (Second) of Torts § 46 which outlines a cause of action for outrageous conduct. In order to establish a claim, the plaintiff must prove the following elements: the wrongdoer's conduct must be intentional or reckless; the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; there must be a causal connection between the wrongdoer's conduct and the emotional distress; and the emotional distress suffered must be severe. *Osborne v. Payne*, 31 S.W.3d 911, 913-14 (Ky. 2000). The tort is not available for "petty insults, unkind words and minor indignities." *Kroger Company v. Willgruber*, 920 S.W.2d 61, 65 (Ky. 1996). Nor is it to compensate for behavior that is "cold, callous, and lacking sensitivity[.]" *Humana of Ky., Inc. v. Seitz*, 796 S.W.2d 1, 4 (Ky. 1990). Instead, in order to be actionable, the harassing conduct must be "a deviation from all reasonable bounds of decency and [ ]utterly intolerable in a civilized community." *Craft*, 671 S.W.2d at 250.

We have carefully reviewed the testimony both of Timothy Penick and of Kathy Penick. Each of them described tense encounters with the Smiths. On occasion, the Smiths shouted and swore at them, and they displayed vulgar images along the easement. The Penicks indicated that these interactions between the parties made them feel “uncomfortable” and caused them to be “offended.” They also described the confrontations as “intimidating” and “very nerve racking.” Each of them indicated that they worried for the physical safety of the other as well as for themselves. On one occasion, the local sheriff’s office was called to intervene.

The behavior of the Smiths -- as portrayed by the Penicks -- could certainly be characterized as reprehensible. It appears that the Smiths were often unduly hostile and aggressive, and their conduct undoubtedly upset the Penicks. However, we are not persuaded that the trial court erred by concluding that the Smiths’ conduct was not actionable because it fell short of the extreme conduct necessary to establish the tort of outrage.

Because it was neither extreme nor outrageous, the Smiths’ conduct fails to meet the rigorous standard established in *Craft*. Nor did the Smiths’ conduct intentionally or recklessly cause severe mental anguish. The Penicks did not indicate that they had been traumatized by the interactions; that they had withstood an unbearable humiliation; or that they had suffered any extraordinary



indignity. They did not testify that either of them felt sick or depressed as a result of the conflict between the parties. Consequently, the trial court's judgment will not be disturbed with respect to this issue.

Finally, the Penicks argue that the trial court erred by dismissing their claim for tortious interference with a contractual right. Again, we disagree.

In order to prove that the Smiths tortiously interfered with a contract, the Penicks must show: (1) the existence of a contract; (2) the Smiths' knowledge of the contract; (3) that the Smiths intended to cause a breach of that contract; (4) that the Smiths' actions caused a breach; (5) that damages resulted; and (6) that the Smiths had no privilege or justification to excuse their conduct. *Ventas, Inc. v. Health Care Property Investors, Inc.*, 635 F.Supp.2d 612, 618-19 (W.D. Ky. 2009).

We conclude that none of the elements for tortious interference with contractual relations was met in this case. The Penicks allege that the express easement granted by deed to their predecessor in title and running with the land constitutes a contract. However, we find it sufficient to note that neither the Penicks nor their invitees were ever prevented from using the right-of-way. Therefore, we also affirm the trial court's decision to dismiss the claim for tortious interference.

The judgment of the Allen Circuit Court is affirmed in part, vacated in part, and remanded for entry of an appropriate order with respect to the gate.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Harlin Parker  
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BRIEF FOR APPELLEES:

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