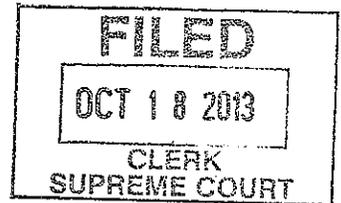


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2012-SC-00716-D
(2009-CA-002163)



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R. MICHAEL TEMPE
SHEILA J. TEMPE
ALLEN W. AMSTUTZ
BEVERLY J. AMSTUTZ

APPELLANTS

v.

BRIEF FOR APPELLANTS

REGINA S. CARRIER
CARL WAYNE CARRIER

APPELLEES

APPEAL FROM KENTUCKY COURT OF APPEALS
CASE NO. 2009-CA-002163

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INTRODUCTION

This is a Declaratory Judgment case brought by property owners in Sandy Beach Subdivision to restrict use and access from adjoining subdivisions lot owners whom are improperly installing driveways on Sandy Beach Lane. Appellants appeal the Kentucky Court of Appeal's decision which found a 1-foot barrier between the subdivisions was not restricted and classified Sandy Beach Lane as a public roadway based upon the doctrine of dedication by estoppel involving plat.

STATEMENT CONCERNING ORAL ARGUMENT

Appellants desire oral arguments before the Court and believe that it would be beneficial for the Court in deciding the issues presented. This case is very fact intensive and touches on numerous legal theories to which the Court would benefit in hearing from the parties.

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EXHIBIT B. Findings of Fact, Conclusions of Law and Judgment

STATEMENT OF THE CASE

On October 8, 2007, Appellants filed a Complaint for Declaration of Rights in Breckinridge Circuit Court against the Appellees. *See Generally*, Complaint for Declaration of Rights, R., 5-12. The relief sought in the complaint was to have Sandy Beach Lane designated as a private roadway, restrict installation of driveways on Sandy Beach Lane from adjacent subdivisions and allow Appellants access to a 1.256 tract of ground previously designated as a turn-around. *See* Complaint for Declaration of Rights, R., 5-12; *See also* Appendix, Exhibit B, Findings of Fact, Conclusions of Law and Judgment, Pages 1-2.

The Breckinridge Circuit Court conducted an evidentiary hearing on May 11, 2009 wherein all interested parties testified and introduced evidence regarding the case. Freidel Hinton, one of the original developers of Sandy Beach Subdivision testified regarding his intention as developer for Sandy Beach Lane to be eventually transferred to the lot owners and that no other subdivision could attach driveways to Sandy Beach Lane. May 11, 2009 Hearing, 09:37-10-15 & 09:38:20. In furtherance of this desire, he constructed a 1-foot strip of land between the existing road (Sandy Beach Lane) and the James F. (Buddy) & Danny O'Donoghue property as referenced on the Plat of Sandy Beach Subdivision recorded on August 8, 1990 in Plat Book 3, Page 30, records of the Breckinridge County Court Clerk's Office as a barrier between the properties. R., 396.

After Sandy Beach Subdivision was developed, other developments such as Taylor's Landing and Sandy Beach II were developed. R., 399 and 403. Danny O'Donoghue, a life-long resident near or on the property testified about participating in the sale of these other subdivisions and the fact that Sandy Beach Lane could not be used

by these other subdivisions which resulted in these adjacent properties building their own roads for access. 09:20:56 & 09:20:30-35.

Mike Tepe, a Sandy Beach Subdivision lot owner of 18 years at that time, testified about paying an annual road maintenance fee and that it was his understanding through Elsie Martin, as a real estate agent of the developers, that there was a "barrier" around the neighborhood so that no one else could come in on them, referring to the 1 foot strip of ground reserved by the original developers. 09:49:31-35. Sheila Kirchheimer also testified about the 1 foot strip along the road and that Friedel Hinton advised her it was to protect Sandy Beach Lot Owners from having other subdivisions tying onto Sandy Beach Lane. 10:11:38-49.

Appellee Wayne Carrier admitted that he believed the original intent of the 1 foot strip was to protect Sandy Beach from unzoned land. 1:37:21. Mr. Carrier initially only owned one lot in Sandy Beach Subdivision, then on March 20, 2002 in Deed Book 281, Page 96, records of the Breckinrdige County Court Clerk's Office, he subsequently acquired the remaining interest of Sandy Beach Subdivision making he and his wife the present developers. *See Appendix, Exhibit B, Page 7.*

Mr. Carrier also began developing property adjacent to Sandy Beach Lane and allowed certain people the right to install driveways onto Sandy Beach Lane. 1:21:58 & 1:23:19. Mr. Carrier also granted these individuals from a totally separate subdivision a waiver that they never had to pay a road maintenance fee for Sandy Beach Lane. 1:42:45. His actions were monetarily driven as Sandy Beach Lane is closer to the water and allowing these underdeveloped subdivisions the right to hook onto an already blacktopped road would allow him to sell the lots at a much higher price. 1:42:15-25.

Mr. Carrier also exempted himself from any annual road maintenance fees for the upkeep of Sandy Beach Lane. 1:59:18.

On October 21, 2009, the Breckinridge Circuit Court entered a Findings of Fact, Conclusions of Law and Judgment regarding the above-referenced case. This court made several important findings, to wit:

In an answer to the Complaint, Defendants Carl Wayne Carrier and Regina S. Carrier stated,

As the owner of the one foot strip of land between Sandy Beach Road [Lane] and portions of the O'Donoghue property, Defendants Carrier have maintained and do maintain that they hold the right to grant owners from O'Donoghue ... the right to cross the one foot strip of land to Sandy Beach Road [Lane] if and when certain conditions [in] their discretion are met, to wit: The need to participate in the maintenance of the private roadway. Such was the scheme of the original common owner, the original developer and such is the scheme of the Defendants Carrier.

See Carrier Answer to Complaint R., 53-59; See also Appendix, Exhibit B, Page 3.

The court established the chain of title to determine the original developers. It found that the parent tract owned by James Franklin O'Donoghue was conveyed by Contract for Deed to Charles L. Martin and Friedell Hinton in Deed Book 193, Page 655, records of the Breckinrdige County Court Clerk's Office. Appendix, Exhibit B, Page 6. The court went on to state, "the Martins and Hintons were the Developers of Sandy Beach Subdivision referred to on the plat and restrictions." Appendix, Exhibit B, Page 6.

There was also a finding that the plat specifically stated, "[d]eveloper retains a 1.0 ft. strip of land between existing road and the James F. (Buddy) & Danny O'Donoghue property." Appendix, Exhibit B, Page 6. On April 3, 1992, the heirs of James Franklin O'Donoghue conveyed the property that is Sandy Beach Subdivision to Sandy Beach,

Inc. and reserved a right-of-way access to Rough River Lake for the family. The Court noted that the O'Donoghues were not the developers nor did they express an intent to connect additional roads to Sandy Beach Subdivision. Appendix, Exhibit B, Page 7.

The Carriers as owners of the adjacent subdivisions Taylor's Landing and Sandy Beach II subsequently recorded plat of record in the Breckinridge County Court Clerk's Office. Appendix, Exhibit B, Page 7, *See also* R., 399 and 403.

The lower court then found Sandy Beach Lane to be a private roadway and address the issue of the Appellees having the right to access the road from adjoining subdivisions. It held, "[t]he clear and unmistakable answer on the issue is 'no'". Appendix, Exhibit B, Page 14. This court applied McBrayer v. Davis, Ky. App., 307 S.W.2d 14 (1957) which held, "[t]he owner of the servient tenement cannot extend or enlarge the easement to include property not a part of the original tract, thus increasing the burden of repair on the dominant tenement, without the consent of the parties affected." Appendix, Exhibit B, Page 14; *See also* McBrayer v. Davis, Ky., App., 307 S.W.2d 14 (1957).

The lower court further found that, "the case law provides it is the intent of the Developers at the time of the subdivision of the property which is of critical importance" and that the unrefuted testimony of Friedell Hinton that it was their express intent to limit access to Sandy Beach Lane from adjoining developments. Appendix, Exhibit B, Page 15.

It also found that additional use of Sandy Beach Lane by the Appellees would constitute an unreasonable burden on the Appellants easement and rights to use Sandy

Beach Lane and such use was not contemplated by the original owners/developers of Sandy Beach Subdivision. Appendix, Exhibit B, Page 16.

The court, in addressing the issue of the turn around (cul-de-sac) found that the Appellants had the right to use this and that the Appellees failed to establish that they could cross the 1 foot strip by prescriptive easement. Appendix, Exhibit B, Pages 17-18.

Lastly, the court found that Sandy Beach is a private roadway. The court noted that the restrictions for Sandy Beach clearly reflected the road was to be maintained as a private road. Appendix, Exhibit B, Page 19. In finding so, it noted that no witness established their use as continuous for at least fifteen years to prove adverse possession or prescriptive easement. Id. Importantly, the lower court noted that Sandy Beach Subdivision does not dedicate the roads therein for public use.

Appellee's appealed this matter to the Kentucky Court of Appeals and on April 13, 2012, said Court rendered an opinion reversing and remanding. In stark contrast to the lower court's opinion, this court found that Sandy Beach Lane was a public roadway and the 1 foot strip was not restricting in use based upon the doctrine of estoppel by plat. *See Generally* Opinion, Exhibit A.

The Court of Appeals found that the Carriers rejected that Sandy Beach Lane was a private road despite their written answer to the complaint. R. 53-59. The Court of Appeals noted that the legal status of the one foot strip between the subdivisions was crucial to the dispute between the parties. Appendix, Exhibit A, Page 4. They also found that the plat of Sandy Beach Subdivision does not expressly identify Sandy Beach Lane as a private or public roadway. Appendix, Exhibit A, Page 5. The Court of Appeals further notes that on the same day of the recording of the plat, Lot 71 was conveyed off

and referenced the deed of restrictions which again did not explicitly state whether or not Sandy Beach Lane was a private or public roadway. Appendix, Exhibit A, Page 6.

The Court of Appeals then discussed the concept of common-law dedication of private property for a public purpose, an issue not raised by either party on appeal. Despite stating that, “common-law dedication is premised upon the express or implied intent of the dedicator [or developer in the context of this case] to devote his property to a public use and the corresponding public acceptance of such property”; they inexplicably skipped down to a subset type of dedication, being dedication by estoppel involving plat as their ultimate holding in this case. Appendix, Exhibit A, Page 7-8.

This court reasoned that since a plat had been recorded for Sandy Beach and a lot, i.e., Lot 71, had been sold off, all roads were irrevocably and completely deemed for public use thereafter based upon dedication by estoppel involving plat. Appendix, Exhibit A, Page 11. They ignored the fact that the lot owners in Sandy Beach paid road maintenance fees and the fact that the Appellees failed to prove access to the public by prescriptive easement or adverse possession.

The Court of Appeals then found that there was not a written instrument expressly restricting the use of the 1 foot strip and as such it could not be restricted. However, they never address the seminal question in the case as to whether or not lot owners in adjoining subdivisions, i.e, Taylor’s Landing and Sandy Beach II, may still install driveways onto Sandy Beach Lane.

A petition for rehearing was denied on October 9, 2012. Appellants subsequently filed a motion for discretionary review on November 7, 2012 that was granted by this Court on August 21, 2013.

ARGUMENT

I. THE EASEMENT GRANTED FOR THE USE OF SANDY BEACH LANE CANNOT BE EXTENDED OR ENLARGED BY PROPERTY OWNERS IN ADJACENT SUBDIVISIONS

The main concern and question raised in this case is whether or not adjoining property owners in neighboring subdivisions can be allowed to install additional driveways and/or culverts upon Sandy Beach Lane. *See Generally* Complaint for Declaration of Rights, R., 5-12. This question was definitively answered by the lower court as “no” and purposefully avoided by the Court of Appeals. *See Generally* Appendix, Exhibits A and B.

McBrayer v. Davis, Ky., 307 S.W.2d 14 (1957) continues to be the most clear and applicable case to the one presented today which, when analyzed, states that lot owners in Taylor’s Landing and Sandy Beach II simply have no right to interfere with and enlarge an easement on a separate subdivision. In McBrayer, Mrs. Salisbury was the owner of a large tract of land in Ashland upon which sat two dwellings, known as the ‘big house’ and the ‘cottage’. Id. at 15. Mrs. Salisbury had these dwellings moved and divided the northern portion of her property into lots, which she subsequently sold. Id.

Mrs. Salisbury granted an express easement to the lot owners for use of the road as a means of ingress and egress to their property. Id. After her death, her property was left in the trust and said trustees sought to convey a portion of the trust property to extend the western boundary and to grant the new purchaser the right to reach adjoining land owned by him. Id. This subsequent purchaser was not part of the Salisbury tract wherein she initially conveyed to the original lot owners.

In the case at hand, the tracts of Sandy Beach, Taylor's Landing and Sandy Beach II all originated from the O'Donoghues. 9:20. However, as in the McBrayer case, Sandy Beach Subdivision was developed first and the lots sold completely independent and separate from these other subdivisions. Developer Friedell Hinton, along with the other original developers, created Sandy Beach Lane for the lot owners of Sandy Beach for ingress/egress to their lots and a turn-around. 9:31:50 and 9:34:25.

Subsequent developer Wayne Carrier, just as the trustees for Mrs. Salisbury, in order to greatly enhance the value of the lots he was developing, declared that owners of Taylor's Landing and Sandy Beach II could install additional driveways upon Sandy Beach Lane for ingress/egress to their lots in a separate subdivision. 1:21:58 and 1:23:19.

The McBrayer Court described it as follows:

In the case before us the common grantor of the easements divided her property into lots representing a real estate development plan. Only after the division was complete did she sell her lots and the buyers thereof were entitled to a belief that the arrangement would continue substantially the same as it then was. This arrangement gave to both grantor and grantee the right to use the roadway 'as now established'. The Salisbury heirs and assigns and the appellant are entitled to use the roadway as a passway and a means of ingress and egress, **but none of them can enlarge and extend this use to reach property not a part of the original subdivision.**

Id. at 16 , Emphasis Added.

The logic and rationale of the McBrayer Court has to hold true today. The Court of Appeals case is replete with due concern for the public at large, but where is the concern for the actual lot owners of Sandy Beach whom have paid a premium for owning lake front property? The holding in the McBrayer case is that once parties have agreed upon an easement, neither party or their assigns can later increase or further burden that easement unreasonably. *See Generally Id.*

The law was further developed in Delph v. Daly, Ky. App., 444 S.W.2d 738 (1969) which again discussed the building of a roadway joining an existing roadway in Gallatin County. Again, you had a common developer who died and then subsequent owners began the development of a new subdivision extending the roadway from the original subdivision. Id. at 740. Interestingly, the court noted, “[i]t is evident from this record that the legal character of the ‘Road Easement’ is not established specifically by the plat or the deeds.” Id.

In addressing this problem, Delph held,

The tendency of modern decisions is to disregard technicalities and to treat all uncertainties in a conveyance as ambiguities subject to be cleared up by resort to the intention of the parties as gathered from the instrument itself, the circumstances attending and leading up to its execution, and the subject matter and the situation of the parties as of that time. Hence, in the construction of deeds surrounding circumstances are accorded due weight. In the consideration of these various factors, the court will place itself as nearly as possible in the position of the parties when the instrument was executed.

Id. (Citing Monroe v. Rucker, 310 Ky. 229, 230 S.W. 391, 393 (1949)).

Getting back to the enlargement of the burden on the easement, the Delph case presented a different scenario but further developed the law by allowing the adjoining roadway to connect to the existing, but only after the court decided the additional use was contemplated by the parties. Id. at 742. Such cannot be said for the case at bar.

Friedell Hinton, as the original developer of Sandy Beach Subdivision, specifically stated that the subdivision was developed in such a way as, “[t]o keep anyone else from hooking onto the road we just built.” 9:35:09-22. Sandy Beach Lot Owners Sheila Kirchheimer and Mike Tepe also stated that it was their understanding and belief that Sandy Beach Lane could not be further accessed by another subdivision. 9:49:31-35

and 10:11:38-49. There are logically only two groups who can speak to the intent of the development of Sandy Beach, and that is the developer who sold the lots and the lot owners themselves. To imply or infer something different or otherwise ignores the clear intent of the parties is unfair to the grantors and grantees to the transaction. Delph distinguished the McBrayer case and found that, “[i]n our view, the additional use was contemplated by the parties, and, therefore, it cannot be held unreasonable.” Id. at 742.

Smith v. Combs, Ky. App., 554 S.W.2d 412 (1977) was the next in the line of cases discussing this issue. Smith summarized the law to this point and required the lower courts to make specific findings necessary for an appellate court to apply the doctrine established. Smith stated,

In McBrayer v. Davis, Ky., 307 S.W.2d 14 (1957), the Court seemed to hold that no unreasonable burden is placed on a private roadway easement by granting additional parties the right to use it as long as the right of use is given only to land which constituted a part of the original tract subdivided. The subsequent case of Delph v. Daly, Ky., 444 S.W.2d 738 (1969), involved a situation in which a roadway was being extended to another part of the original tract owned by the subdividers. While citing the McBrayer case for the proposition that the use of the roadway could not be extended beyond the original tract, the Court went on to consider whether the additional use of the roadway would be an unreasonable burden on the existing easement. Finding that the additional use was contemplated by the parties the Court concluded, therefore, that it could not constitute an unreasonable burden. The present status of our case law, then, is that extending the use of a roadway easement to land not a part of the original tract constitutes an unreasonable burden, McBrayer v. Davis, supra.

Id. at 413-414.

In examining the current case and in compliance with Smith, the lower court found that additional use of Sandy Beach Lane by the Appellees would constitute an unreasonable burden on the Appellant’s easement and such use was not contemplated by the parties. Appendix, Exhibit B, Page 16.

A. THE ONE-FOOT BARRIER AROUND SANDY BEACH SUBDIVISION, WHILE NOT DETERMINATIVE, IS FURTHER EVIDENCE OF THE DEVELOPERS INTENT NOT TO ALLOW INSTALLATION OF ADDITIONAL DRIVEWAYS ON SANDY BEACH LANE.

Sandy Beach Subdivision was developed with a one-foot strip of land along the exterior of the subdivision immediately adjacent to Sandy Beach Lane. R., 396; *See also* 9:38:20. The plat of Sandy Beach states, "NOTE: DEVELOPER RETAINS A 1.0 FT. STRIP OF LAND BETWEEN EXISTING ROAD AND THE JAMES F. (BUDDY) & DANNY O'DONOGHUE PROPERTY." R., 396.

Danny O'Donoghue himself testified that no road existed for Sandy Beach Subdivision until Sandy Beach Lane was built and that he understood access to it from other subdivisions was restricted. 9:20:42 and 9:20:56.

The one-foot strip, while informative, it not really the key to any issue in this case. Appellants would submit that it is what it is, simply put, a barrier around Sandy Beach Subdivision and consequentially Sandy Beach Lane. It was placed there by the developer and we have his testimony as to what it meant. We have testimony as to what it meant to the lot owners of Sandy Beach. The fact remains, however, that it does not even have to exist because the installation of driveways from Taylor's Landing and Sandy Beach II onto Sandy Beach Lane still constitute an unreasonable burden upon the original easement because it was never contemplated by the parties.

The infamous one-foot strip has developed a life of its own in this case culminating in the Court of Appeals declaring that, "[t]he legal status of the one-foot strip of land is pivotal to the parties' dispute on appeal." Appendix, Exhibit A, Page 4. The Appellants would respectfully submit that the Court of Appeals never used the one-foot

strip's "legal status" in fashioning its opinion. The one-foot strip is, in large part, a red-herring.¹

The Court of Appeals completely skip over the concept of the one-foot strip and rule that since there is no explicit restriction stated in the plat or otherwise, it cannot be restricted in use. Appendix, Exhibit A, Page 14. Merely because the one-foot strip cannot be restricted in use does not answer the question asked by the litigants as to whether or not a neighboring subdivision can install driveways on a separate subdivision's only means of ingress and egress.

Why would someone intentionally place a one-foot strip of ground around a subdivision? You cannot build on it or install utilities. This question was answered by Larry Johnson a licensed surveyor for the Commonwealth of Kentucky and witness for the Appellees. His belief was that it was made for a couple of reasons and stated it could be for a walking pass or to keep access from an adjoining piece of property. 12:18.

Assuming *arguendo*, that the one-foot strip barrier did not exist, Taylor's Landing and Sandy Beach II would still have absolutely no more right to access Sandy Beach Lane than before. That is because under the line of cases of McBrayer, Delph and Smith, it was never contemplated by the parties. It seems to the Appellants clear what the definition of "parties" are in the context of this case, and this Court benefits from the Breckinridge Circuit Court detailing in great fashion its analysis as to whom the developers are in this case so as to leave no question or dispute. Appendix, Exhibit B, Pages 5-10.

¹ **Red herring** is an idiom that refers to a logical fallacy that misleads or detracts from the actual issue. OXFORD ENGLISH DICTIONARY, 3RD EDITION, SEPTEMBER, 2009

Since the original developers are one side of the coin, the other must be the lot owners in Sandy Beach. There is no privity of contract with any of the lot owners in Taylor's Landing and Sandy Beach II as to the deal struck and agreement reached between the original developer and lot owners in Sandy Beach. If this was a situation where this particular development was Phase 1 of 4 in Sandy Beach, the plat would have said so and the owners would have been held to understand that new roads and extensions could be granted. But the fact remains that Sandy Beach Subdivision was a single real estate development with a single road for ingress and egress for those lot owners only and as such no additional driveways or extensions of the road can be granted.

B. THE CARRIERS, AS SUCCESSIVE DEVELOPERS, CANNOT INTERFERE WITH THE EXISTING EASEMENT GRANTED TO APPELLANTS FOR USE OF SANDY BEACH LANE PURSUANT TO SAWYERS V. BELLER

Sawyers v. Beller, 384 S.W.3d 107 (Ky. 2012) involves the maintenance and use of a roadway in Allen County. *See Generally*. The Sawyers and Bellers are adjoining landowners whom have an interest in a roadway traced back to a common grantor. Id. at 109. After the Bellers acquired their property, they gated Fishback Road and limited access to the Sawyers. Id. at 110. The lower court ordered Bellers to permit Sawyers use of Fishback Road for personal access, but ordered Sawyers to maintain the roadway without being able to rock the road to which the Court of Appeals affirmed. Id.

This Court reasoned that since the Sawyers, as owners of the dominant estate, had an express easement to Fishback Road, the limitations on personal use and rocking the road was unreasonable. Id. at 112. The Court concluded that Bellers must permit the free and unrestricted use of the servient estate by the dominant estate. Id. at 111.

Appellants are lot owners in Sandy Beach Subdivision. They all purchased lots according to a plat which identified and referenced Sandy Beach Lane as their sole means of ingress and egress. R. 396. The Sawyers Court stated that, “[u]nder Kentucky law, the rights created by an easement depend upon its classification. Loid v. Kell, 844 S.W.2d 428, 430 (Ky. App., 1992). An express easement is created by a written grant with the formalities of a deed.” Sawyer at 111 (Citing Loid at 429-430). As such, Appellants have an express easement for the use of Sandy Beach Lane.

Under this scenario, Appellants would argue that each of their lots represents a dominant estate and the developers balance of the subdivision, including Sandy Beach Lane represents a servient estate. It is this easement which, “is a privilege or an interest in land and invests the owner [Appellants] with ‘privileges that he cannot be deprived of at the mere will or wish of the proprietor of the servient estate [Appellee]’”. Id. at 111 (Citing Louisville Chair & Furniture Co. v. Otter, 219 Ky. 757, 294 S.W. 483, 485 (1927)).

The Carriers, as successive developers of Sandy Beach Subdivision, and the Appellants as the lot owners are mutually fixed with the easement as it was created. The Sawyer case went on to say, “[w]hile an easement holder may not expand the use of the easement, it is equally true that the easement grantor may not interfere with the easement holder’s use of the easement.” Id. at 111 (Citing Commonwealth, Dept. of Fish and Wildlife Res v. Garner, 896 S.W.2d 10, 13-14 (Ky. 1995)).

If all of the Appellants banded together and repaved Sandy Beach Lane wider than it currently exists just because they wanted a wider road, Sawyer would stand for the proposition that the easement holder would be precluded from doing so because they

cannot expand the use of their easement. Conversely, Sawyer also provides that the Carriers cannot interfere with the easement granted to the Appellants by allowing adjoining lot owners in Taylor's Landing and Sandy Beach II to install driveways on Sandy Beach Lane.

II. THE INTENT OF THE DEVELOPERS AT THE TIME OF DEVELOPMENT AND RECORDED RESTRICTIONS FOR SANDY BEACH LANE TO BE PRIVATE IS CONTROLLING OVER DEDICATION BY ESTOPPEL INVOLVING PLAT

The secondary issue to be addressed in this appeal is the legal status of Sandy Beach Lane as a private or public roadway. This Court is left with two options on the matter, i.e., (1) to ascertain the intent of the developer at the time of the development based upon their acts, deeds, and testimony provided or (2) impose an arbitrary legal fiction upon the parties by use of dedication by estoppel involving plat.

The Court of Appeals, in support of their dedication by estoppel involving plat stated, "the subjective intent of the dedicator is immaterial; rather, it is the objective intent as manifested by the dedicator's conduct that controls." Appendix, Exhibit A, Page 8. While the Appellants would argue that intent at the time of development is controlling over dedication by estoppel involving plat, they would respectfully submit that an analysis of the objective intent of the dedicator would still result in the conclusion that Sandy Beach Lane is a private roadway. It seems as if the Court of Appeals asserted a legal theory to support their conclusion, but failed to analyze the facts of this particular case to determine what exactly was the objective intent of the dedicator. They relied solely on what precise language was used in the plat and deeds, but largely ignored any objective intent of the developers. *See Generally* Appendix, Exhibit A.

To understand the difference between subjective and objective intent, one must look to their definitions as they relate to contract law. A succinct discussion of these theories of assent is as follows:

When a court determines whether a party has assented to an agreement, is it the party's actual or its apparent intention that matters? This question provoked one of the most significant doctrinal struggles in the development of contract law, that between subjective and objective theories.

The subjectivists looked to the actual or subjective intentions of the parties. The subjectivists did not go as far as to advocate that subjective assent alone was sufficient to make a contract. Even under the subjective theory there had to be some manifestation of assent. But actual assent to the agreement on the part of both parties was *necessary*, and without it there could be no contract. In the much-abused metaphor, there had to be a "meeting of the minds."

The objectivists, on the other hand, looked to the external or objective appearance of the parties' intentions as manifested by their actions....

According to the objectivists, a party's mental assent was not necessary to make a contract. After all, was not contract law intended to protect *reasonable* expectations? If one party's actions, judged by a standard of reasonableness, manifested to the other party an intention to agree, the real but unexpressed state of the first party's mind was irrelevant.

FARNSWORTH ON CONTRACTS, 3D, § 3.6, P. 117

Based upon these definitions, it is clear that the subjective intent of the developer at the time of the development was for Sandy Beach Lane to be private. 9:35:9-22 The Appellants, however, are not solely relying on what was in the mind of Friedell Hinton at the execution of the deeds and plat. To rely completely on his unspoken beliefs and expectations would not be fair to the lot owners of Sandy Beach. Rather, as the Court of Appeals stated, we must look also at his objective intent at the time of the development, i.e., his external intentions manifested by his actions. This is where the Court of Appeals fails in their analysis.

The Appellants would respectfully submit that the intent of the developer at the time of the development and the understanding of the lot owners is the more compelling method for determining the status of the roadway in question. The lower courts are clearly at odds over what was stated and intended by the developers. The Breckinridge Circuit Court stated, “[t]he initial [r]estrictions for Sandy Beach Subdivision clearly reflect the road was to be maintained as a ‘private’ road.” Appendix, Exhibit B, Page 18. The Court of Appeals, on the other hand, stated, “[t]he plat does not expressly set forth whether Sandy Beach Lane is a public or private road; it simply identifies Sandy Beach Lane as an ‘access road’. In fact, no written instrument expressly delineates whether Sandy Beach Lane is a private or public road.” Appendix, Exhibit A, Page 10. The Court of Appeals is wrong as the deed of restrictions clearly show Sandy Beach Lane as intended to be a private roadway.

A. THE INTENT OF THE PARTIES IN THE DEED OF RESTRICTIONS IS CONTROLLING OVER THE USE AND ACCESS TO SANDY BEACH LANE

First, as the lower court held, the original deed of restrictions and amended deed of restrictions for Sandy Beach Subdivision conclusively prove that Sandy Beach Lane is a private roadway. Paragraph 17 of the original restrictions, discussing the annual road maintenance fee for the lot owners, states in part, “[i]n the event that a government body assumes responsibility for the maintenance of said road [Sandy Beach Lane], the assessment shall be terminated, **and all property owners shall grant such government body a forty (40) foot road easement...**” R. 440-444 (Emphasis Added). As noted by the lower court, on January 16, 2003, the Carriers, in an Amended Deed of Declaration of

Restrictions contains this exact same language. *See* Amended Deed of Declaration of Restrictions, R. 445-448, *See Also* Findings of Fact, Page 8.

The language in these restrictions show that not only did the Appellants have a written guarantee from the developers that Sandy Beach Lane was private, it went further to vest them with the authority to “grant” a governmental body, if and when it took over maintenance of the road, an easement. In order for the Appellants to grant an easement to someone else at a later time, they must have sole authority over the road. This is not some ethereal reading of tarot cards, this is in black and white. Friedell Hinton and Donald Martin, as developers of Sandy Beach Subdivision, expressly granted the lot owners of Sandy Beach Lane with the upkeep and maintenance of the road and with that, they and they alone had authority to convey an easement to a political entity for upkeep in the future. This was the developers objective intent, an external action taken, in writing, that evidenced their express intention for Sandy Beach Lane to be private.

More guidance can be found from the Sawyers case in determining whether or not Sandy Beach Lane is private or public. This Court held, [i]f the language is unambiguous, the intent of the parties at the time the easement agreement was executed must be determined from the context of the agreement itself.” Id. at 111 (Citing Texas E. Transmission Corp v. Carman, 314 S.W.2d 684, 687 (Ky. 1958) *See also* Puckett v. Hatcher, 307 Ky. 160, 209 S.W.2d 742, 744 (1948)).

One needs to only look at the bargained for exchange between the parties to see that Sandy Beach Lane was always intended to be a private roadway. The developers created the road, the lot owners paid for its upkeep and these parties agreed if and when a governmental agency took it over, the lot owners would turn it over for their upkeep. *See*

Deed of Restrictions and Amended Deed of Restrictions, R. 440-444 and 445-448; 9:37:10-15. The deed of restrictions speak for themselves. For the Court of Appeals to state that no written instrument exists declaring Sandy Beach Lane as private or public simply ignores the only logical interpretation of these restrictions.

B. THE INTENT OF THE PARTIES BASED UPON THEIR ACTIONS AND TESTIMONY FURTHER SUPPORT THE FACT THAT SANDY BEACH LANE IS A PRIVATE ROADWAY

Even if this Court does not find the language in the Deed of Restrictions and Amended Deed of Restrictions as being an express intent by the developers, the testimony provided at trial establish an intent for the road to remain private. Friedell Hinton testified that when he was the developer he collected road fee from the lot owners of Sandy Beach. 9:38:35. Again, the contract must be interpreted in light of his actions at the time of the conveyance. Why would a developer impose a road fee, collect said fee for the maintenance and grant the lot owners the right to convey the easement to a third party unless the roadway was private? Sheila Kirchheimer testified that the upper section of the road prior to Sandy Beach Lane branched off for the Appellees to use Buddy Lane for access to their properties. 3:00:02.

Appellant Alan Claypool, a lot owner in Sandy Beach testified that he attempted to keep the public off the road and acknowledged that Mr. Carrier did the same. 2:54. Wayne Carrier also testified that he wanted to keep the public at large off of the road. 1:26. They both intended for the road to remain private and their actions prove this point. There is also a sign on the upper portion of the county maintained road which indicated that county maintenance ended and a sign that said "private roadway", which one would surmise meant that the lot owners of Sandy Beach solely maintained Sandy Beach Lane.

3:00:02-10. Both Appellants and the Developer took action to put the public at large on notice that the lot owners were the ones maintaining this roadway. Kim Jones, an owner in Sandy Beach II, admitted to seeing a sign that said end of county maintenance and at that exact spot there was another sign that said private road. 10:48.

The courts have long held that intent of the parties at the time of the conveyance as a rational method for construing language in a deed. As cited earlier in Delph, this court should, “disregard technicalities and ... treat all uncertainties in a conveyance as ambiguities **subject to be cleared up by resort to the intentions of the parties as gathered from the instrument itself, the circumstances attending and leading up to its execution, and the subject matter and the situation of the parties as of that time.**” Id. at 740 (Emphasis Added). The goal being to place the court, “as nearly as possible in the position of the parties when the instrument was executed.” Id.

This all ties back into the earlier arguments as cited in the McBrayer line of cases discussing what was contemplated by the parties. Both subjective and objective intent and the phrase *what was contemplated by the parties at the time* is one and the same. Again, Smith held that when looking to see if an act enlarging an easement constituted an unreasonable burden, the focus is whether said additional use was contemplated by the parties and if it was not, it could be found unreasonable. Id. at 414. The Court of Appeals decision to ignore both the subjective and objective intent of the dedicator and then made a complete and irrevocable dedication to the public not only ignores these line of cases, but also unintentionally results in the parade of horrors the Appellants outlined in their motion for discretionary review.

**C. PURSUANT TO NASH V. CAMPBELL COUNTY FISCAL COURT,
A ROADWAY MUST BE DEDICATED BY PRESCRIPTION IN**

**ORDER FOR THE PUBLIC AT LARGE TO OBTAIN A RIGHT
OVER SANDY BEACH LANE**

Property owners brought suit against the Campbell County Fiscal Court regarding division of land pursuant to ordinances and zoning regulations. *See Generally Nash v. Campbell County Fiscal Court*, 345 S.W.3d 811 (Ky. 2011) This Court, in discussing dedications of land stated,

Dedication may also be made by private land owners. “Most of the public streets and alleys in [existing] cities have been created by dedication in the platting and development of various city subdivisions.” [internal citation omitted] Such dedications may result from compliance with statutory or regulatory scheme, like subdivision regulations, which contain street specifications, dedications, and in some cases, acceptance of maintenance by the local government. **A private land owner may also be presumed to have made a dedication of land for public way.** [internal citation omitted] **This is creating a public highway by prescription. The theory behind a dedication by prescription holds that the long continued use of a highway by the general public rests upon a presumption of a lost grant, arising from the continuous adverse use of land (with the same elements of adverse possession).** [internal citation omitted].

Id. at 819 (Emphasis Added).

It is clear that this Court just two years ago opted not to expand the law to dedication by estoppel involving plat, but rather took a view that dedication to the public must be proven under the same elements of adverse possession. Applying this law to the facts at hand show that Sandy Beach Lane was never held open to the public for a sufficient period of uninterrupted time such that it must be deemed private. Specifically, the lower court in our case stated, “[a]ll adverse possession witness’ testimony failed to establish the necessary elements... No witness established their use was continuous for at least fifteen years, open, notorious or hostile to prove adverse possession or prescriptive easement.” Appendix, Exhibit B, 19.

This Court's rationale in Nash is well founded as dedication by estoppel involving plat is a dangerous precedent to set. The Appellants would submit that the current state of the law in Kentucky is that Nash overruled City of Middlesboro v. Kentucky Utilities Co., 35 S.W.2d 877 (Ky. App., 1931) in choosing dedication by prescription over dedication by estoppel involving plat. Watson v. Crittenden County Fiscal Court, 771 S.W.2d 47 (Ky. App., 1989) also provides an understanding on dedication by prescription in stating, "we deem the law to be that a public road may be acquired by prescription only upon (1) fifteen years public use and (2) a like number of years of control and maintenance by the government." Id. at 48.

Even still, a close reading of City of Middlesboro would result in a different conclusion than the one reached by the Court of Appeals. As the appellate court cited and City of Middlesboro announced,

[T]he reason for that rule [dedication by estoppel involving plat] is stated to be that by such acts the owner and dedicator induces the purchasers of lots to believe that the public ways will be kept open for, not only his use, but for all person whomsoever and as members of the public they may use them, "and having acted upon the faith of the grantors implied representations based upon his conduct, he is equitably estopped as well in reference to the public as to his grantees from denying the existence of the easement, and from appropriating the land so dedicated to a use inconsistent with that represented by the map upon the faith of which the lots are sold".

Id. at 881.

Again, dedication by estoppel involving plat is not the correct theory of law under which to determine the legal status of Sandy Beach Lane. However, the impetus of the rule, as stated in City of Middlesboro, is what the lot owners of Sandy Beach were induced into believing when they purchased a lot. The Court of Appeals completely

stepped over the rights and valid expectations of the lot owners of Sandy Beach and supplanted their rights with that of the public at large.

City of Middlesboro also reiterates looking at the subjective and objective intent of the developer and as previously stated, the acts of explicitly granting the lot owners their right to Sandy Beach Lane under the written deed of declaration, among other acts, prove Sandy Beach Lane is a private roadway. See Deed of Restrictions R. 440-444 and Amended Deed of Restrictions. R. 445-448. Even under this expansive theory, one cannot get to the conclusion that Sandy Beach Lane is public because the acts of the dedicator and the expectations of the lot owners say otherwise.

If a rational construction of the instrument alleged to effectuate a dedication negates an intent on the part of the landowner to dedicate a particular piece of land, the fact that a reference to the land appears on a map **does not of itself effect a dedication to public use.** 23 AM. JUR., 2D, *DEDICATION* § 26 (Citing Pioneer Production Corp v. Segraves, 340 So. 2d 270 (La. 1976); Mitchell v. Rancho Viejo, Inc., 736 S.W.2d 757 (Tex. App. Corpus Christi 1987), writ refused n.r.e. (Oct. 21, 1987) (golf course on plat not in dedication). There was never an intent, subjective or objective, for the developers of Sandy Beach Subdivision to dedicated Sandy Beach Lane as a public roadway and as such the default position cannot be that the public automatically obtains rights over the private property of another.

The treatise further provides,

The doctrine of dedication by plat or map is frequently connected with the sale of lots shown on a plat or map. By making such a sale, the owner of a tract of land manifests an intent to dedicate the streets, parks, squares, or other places designated on the plat or map for public use. **Evidence may be used to show a contrary intent, as where it appears that the reference to, or mention of, a street in the plat or map is solely for the**

purpose of description...Merely selling lots referred to by a plat or map is not an irrevocable dedication between the vendor and the public, the vendor's acts alone being insufficient to constitute a completed dedication. It may not even, as a matter of law, constitute dedication when there has been incomplete statutory dedication to public use by the plat, nor is it conclusive evidence of intent to dedicated and acceptance by the public.

23 AM .JUR., 2D, *DEDICATION* § 28 (Emphasis Added)
[internal citations omitted]

The application of dedication of estoppel involving plat is not as black-and-white as the Court of Appeals would have you believe. They held that the mere act of recording a plat that did not explicitly say "private road" and selling lots were enough to invoke this dedication. The court held, "[b]y these two collective acts, the original developers ... displayed an objective intent to dedicate Sandy Beach Lane to public use." Appendix, Exhibit A, Page 11. Based upon this logic, the public need not have ever driven on the roadway nor accepted the dedication for the right to be granted!

In Diamond v. City of Newton, 1999 W.L. 162576 (Mass. Super.), Dr. David B. Diamonds sued the City of Newton after he tripped over a cut-off sign post in the grass/dirt area between the road and the sidewalk. *See Generally*. The parties in this case were arguing over location of the post and whether or not it existed in the public way. The court, in having to address one of a host of issues should dedication by estoppel involving plat become the law, stated, "[b]ecause the 1846 statute put an end to the creation of public ways by dedication and acceptance, a public way can presently only be created pursuant to statute or by prescription." *Id.* at 2. While Massachusetts recognized the problem with common-law dedications to the public and the resulting unending liability to the political subdivisions that inherit these public ways, their legislature codified a law 167 years ago to solve this problem. Granted, the Commonwealth of Kentucky does not

presently have such a law, but the court's rationale in Diamond mirrors this Court's logic in Nash.

D. DEDICATION BY ESTOPPEL INVOLVING PLAT CONSTITUTES AN ILLEGAL TAKING AS PROPERTY IS AUTOMATICALLY DEDICATED TO PUBLIC USE WITHOUT DUE PROCESS

The Appellants would submit that another valid reason courts have been reluctant to adopt dedication by estoppel involving plat is that it acts an unconstitutional taking of property. The Court of Appeals decision is crystal clear that if you have a plat that does not explicitly say the roadway is private and one lot is sold off, you have irrevocably dedicated all roadways described in the plat to the public. *See Generally* Opinion.

Martin v. Commonwealth, 199 S.W.3d 195, 199 (Ky. App., 2006) stated, “[a] taking is generally defined as the entering upon private property and devoting it to public use so as to deprive the owner of all beneficial enjoyment. Private property shall not be taken without just compensation.” (Citing 26 Am. Jur. 2d, *Eminent Domain*, § 157) And yet that is precisely what has occurred in this case. Private property owners, i.e., Appellants, have had their only means of ingress and egress to their lake-front homes literally given away to the public, without the public's acceptance or participation. This is fundamentally unfair.

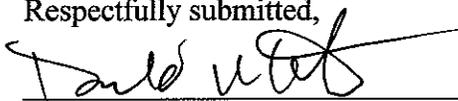
Kentucky Alcoholic Beverage Control Bd. v. Jacobs, 269 S.W.2d 189, 192, (Ky. 1954) further found that “it is elementary that private property cannot be taken, even by the state, without due process of law.” (Citing Truax v. Corrigan, 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 257, 27 A.L.R. 375 (1921); Darlington v. Board of Councilmen of City of Frankfort, 282 Ky. 778, 140 S.W.2d 392 (1940).

We have several methods by which roadways and public areas can be dedicated to the public. It can be done statutorily or through a regulatory scheme such as subdivision regulations as noted in the Nash case. Second, it can be done as held in Delph by looking at the intent of the parties at the time of the conveyance. Thirdly, it can be done through dedication by prescription also described in the Nash case. The public has various ways to obtain an interest in a roadway. Sandy Beach Lane remains private under all three of these theories. To extend the law to a fourth method, being dedication by estoppel involving plat would subvert the interests of the developers and lot owners in these subdivisions and would constitute an unnecessary and overly broad right to the public at large.

CONCLUSION

WHEREFORE, the Appellants respectfully request that this Honorable Court reverse the opinion of the Court of Appeals and affirm the Breckinridge Circuit Court's Findings of Fact, Conclusions of Law and Judgment and in so find that adjoining subdivisions cannot install driveways and unreasonably enlarge the easement on Sandy Beach Lane and that Sandy Beach Lane is a private roadway based upon the arguments set forth above.

Respectfully submitted,



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APPENDIX

APPENDIX LIST:

EXHIBIT A: COURT OF APPEALS OPINION

EXHIBIT B: FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT