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IN THE
COURT OF APPEALS OF INDIANA

Hicks & Sons, LLC,
Appellant-Plaintiff,

v.

Carewell International, LLC,
Appellee-Defendant.

June 9, 2021

Court of Appeals Case No. 20A-PL-1874

Appeal from the Putman Superior Court

The Honorable Charles D. Bridges, Judge

The Honorable Matthew L. Headley, Special Judge

Trial Court Cause No. 67D01-1709-PL-6

Altice, Judge.

Case Summary

[1] Hicks and Sons, LLC (Hicks) appeals the trial court's judgment determining that Carewell International Inc. (Carewell) could continue displaying a Holiday Inn hotel sign within a driveway easement over Hicks's real estate. Hicks claims that the trial court erred in expanding the terms of the ingress-egress easement to include the placement and display of the sign.

[2] We affirm.

Facts and Procedural History

[3] In April 2014, Hicks purchased certain real estate from J. and J., LLC (J. and J.), in Cloverdale for the purpose of operating a flooring business in Putnam County. Hicks completed the purchase without a survey and received a standard owner's title policy at closing. A portion of that policy provided that "any encroachment, encumbrance, . . . or adverse circumstance affecting the title that would be disclosed by an accurate and complete . . . survey of the land" is not covered by the title policy. *Transcript Vol. 3* at 44. An accurate survey would have disclosed all encroachments and encumbrances.

[4] Carewell operates a Holiday Inn franchise in Cloverdale on property that it purchased from Quality Foods, Inc. (Quality Foods) in 1996. This property is

adjacent to the land that Hicks purchased.[1] When Carewell purchased the land to develop the hotel, it negotiated several easement agreements with neighboring property owners.

[5] Two of those easements directly impacted the Hicks real estate. More specifically, a driveway easement that was created and recorded in 1996 grants Carewell ingress and egress over Hicks's property to County Road 900 South, also known as Beagle Club Road. The easement provided that

> **Grant of Easement:** Grantor, for itself and for its grantees, successors and assigns, gives, grants and conveys to Grantee and to Grantee's licensees, invitees, guests, grantees, successors and assigns, forever, a perpetual and nonexclusive right-of-way and easement to be used as an access and way for ingress and egress of vehicular and pedestrian traffic to and from Grantee's Real Estate on, over and along the Easement Real Estate.
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> **Use of Easement Real Estate:** The parties hereto do hereby covenant and agree that the Easement Real Estate shall be used in common by the parties and others as a commercial driveway for the purpose of providing vehicular and pedestrian ingress and egress to and from County Road 900 South, over and across Grantor's Real Estate to and from Grantee's Real Estate, and that *the Easement Real Estate may be freely used and enjoyed by the parties hereto and others for such use and purpose as are common to commercial driveways generally,* including use by the parties'

[1] The trial court noted in its summary judgment order that Quality Foods, the original owner of the parcel of land that Hicks purchased, had presumably sold that parcel to J. and J. at some point.

> respective licensees, invitees, guests, grantees, successors and assigns. . . .

Appellant's Appendix Vol. II at 90-91.

[6] Also, a sign easement grants Carewell the right to install a directional sign for the Holiday Inn within the easement's parameters. That easement identified three separate locations known as the Amoco Parcel, the Annex Parcel, and the Wendy's Parcel. Only the Annex Parcel encumbered Hicks's property.

[7] On June 12, 1997, Quality Foods granted Carewell an express license to install a Holiday Inn sign within the ingress-egress easement that would assist Holiday Inn customers locate the hotel driveway. Thereafter, on March 17, 1998, Carewell obtained an outdoor advertising sign permit from the Indiana Department of Transportation. Carewell later installed the sign in a curbed landscaped island near the west edge of the ingress-egress easement. Carewell then replaced the original sign in 2009 with a larger electrified sign. That sign still currently exists.

[8] After Hicks purchased and closed on the property, it retained a surveyor later in 2014 to prepare a site plan that would show, among other things, the location of its proposed building. The site plan, which was completed in early 2015, detailed the following:

> a. the ingress-egress easement burdened an area of the Hicks parcel forty (40) feet wide from east-to-west, extending from CR 900 South on the north to the Carewell parcel on the south;

b. the west boundary of the ingress-egress easement was contiguous with west boundary of the Hicks parcel;

c. the new Holiday Inn directional sign was located within the boundaries of the ingress-egress easement, but not the sign easement;

d. the sign easement, which is 30 feet by 30 feet, is located to the north of the proposed location of the Hicks building; and

e. one-half of the sign easement (15 feet north-to-south and 30 feet east-to-west) is located in CR 900 South.

Appellant's Appendix at 12-13.

[9] As described above, the site plan depicts both the sign and driveway easements to the extent that they impacted Hicks's real estate. Even though the site survey showed that the Holiday Inn sign was placed on the driveway easement, Hicks nonetheless constructed its building, which was completed sometime in 2016. When Hicks was designing the location of the building and installation of signage, Hicks had the opportunity to consider the dimensions and placement of the Holiday Inn sign.

[10] Hicks's structure is at a higher elevation than the Holiday Inn sign. On the northwest corner of Hicks's building near the roof line, the street number of Hicks's parcel, "2740," is readily visible and not obscured by the Holiday Inn sign for Hicks's customers who are driving east on CR 900 South. *Transcript Vol. 2* at 78, 80. The sign on Hicks's Building, which was installed in January

2017, includes a logo and the word "FLOORING" in large blue block letters. *Appellant's Appendix* at 14. Photographs show that Hicks's building is visible to customers and is not significantly impaired by the Holiday Inn sign.

[11] At some point, Hicks demanded that Carewell remove the Holiday Inn sign. When Carewell refused, Hicks filed a complaint against Carewell on September 15, 2017, seeking damages and injunctive relief for civil and criminal trespass resulting from Carewell's continued maintenance of the sign in its current location. Carewell denied Hicks's claims asserting that the Holiday Inn sign in no way impaired or burdened Hicks's use of the ingress-egress easement. Carewell also filed a counterclaim seeking a declaratory judgment and a request that the trial court quiet title in its favor as to the scope of Carewell's rights with respect to the easements.

[12] On June 12, 2019, Carewell filed a motion for summary judgment alleging that it was entitled to judgment as a matter of law on Hicks's claims. Following a hearing on August 12, 2019, the trial court entered summary judgment for Carewell on the criminal trespass claim and set the civil trespass claim for trial.

[13] At the conclusion of a bench trial on June 16, 2020, the trial court found for Carewell and entered the following findings of fact and conclusions of law:

> 10. The Hicks Real Estate is subject to an Easement and Driveway Agreement. . . . Hicks is the servient property and Carewell is the dominate [sic] property pursuant to easement law.

11. The Driveway Easement provides Carewell ingress and egress over the Hicks Real Estate to County Road 900 South, also known as Beagle Club Road.

12. The Hicks Real Estate is also encumbered by that certain Easement and Signage Agreement dated June 14, 1996 and Recorded on August 27, 1996. Carewell is the benefitting party to the Sign Easement.

13. The . . . Annex Parcel [in the] Sign Easement . . . encumbers the Hicks Real Estate.

14. A site plan depicts both the Sign Easement and the Driveway Easement to the extent both Easements relate to the Hicks Real Estate. Said site plan was developed/created . . . *after Plaintiff purchased the property*. This site plan shows the sign in the ingress/egress easement and not the sign easement.

15. On or around November, 1997, Carewell . . . erected a Holiday Inn sign (the "Original Holiday Inn Sign") on the ingress/egress easement.

16. [The] the majority owner of Carewell testified that the Original Holiday Inn Sign was erected with permission from the prior owner of the Hicks Real Estate, Quality Foods, Inc., pursuant to a letter dated June 12, 1997 (the "Sign Letter").

17. There was no evidence admitted at trial indicating that the Sign Letter was ever recorded with the Putnam County Recorder's Office or that Hicks had knowledge of the existence of the Sign Letter prior to its purchase of the Hicks Real Estate.

18. The Original Holiday Inn Sign was placed within the Driveway Easement, but not within the Sign Easement.

19. The Original Holiday Inn Sign measured 12' from the ground to the bottom of the sign face, with the sign face width of 8' 8" and height of 5' 8," for a total sign height of 17' 8."

20. The Original Holiday Inn Sign was replaced in 2009 by a new Holiday Inn Sign (the "Holiday Inn Sign"). It is the one that is in existence today and was there some 5 years prior to Hicks purchasing his property.

21. The Holiday Inn Sign is electrified, with the face of the sign measuring 6'-1 ¼" x 12' 5", with an overall height of 21' 5".

22. *The current location of the Holiday Inn Sign is depicted on the Site Plan*.

23. During the period that Hicks was purchasing in 2014 the Hicks Real Estate, the Holiday Inn Sign may have been covered while the Holiday Inn was closed for renovations.

24. Hicks has not granted Carewell authority or permission to erect or maintain the Holiday Inn Sign on the Hicks Real Estate in its current location.

25. Hicks has a sign on its building intended to advertise to its customers its location (the "Hicks Sign").

26. The Holiday Inn Sign is in front of the Hicks Sign if someone were to look due East from US 231 Hwy.

27. Hicks has demanded Carewell remove or relocate the Holiday Inn Sign, but Carewell has refused to remove the sign.

28. Carewell also possess[es] separate easements rights for ingress and egress further south on US Hwy 231 and further away from I-70 interchange ("the southern easement").

29. Carewell does not have a sign at or near the ingress and egress driveway located on U.S. Highway 231. There is no stoplight at that location however, the one at C.R. 900 does have a stop light. Carewell, via counsel, demonstrated that a person using GPS from 1-70 to Holiday Inn would be directed to turn at 900 South and then in front of Hicks.

30. Carewell does not currently utilize any of the sign easements identified in the Sign Easement for a sign. *The sign easement on C.R. 900 would be impractical (if not impossible) to be used as a placement for signage due to the now locality of Hicks['s] building and municipal lines underneath.*

31. Carewell does utilize a pole sign that is located on Carewell's real estate near the Holiday Inn.

32. Hicks purchased the land in April 2014 and as part of the closing documents he received a standard owners title policy that excluded encroachments that would have been disclosed by an accurate survey. . . . *Hicks completed purchase without this survey. Later, Hicks caused ASA Land Surveying to prepare a site survey which showed the Holiday Inn sign on the driveway easement. Hicks still built [its] building with said knowledge of the sign in the ingress/egress easement. After Hicks['s] building was completed, approximately 2 years later, [it] sued Carewell.*

. . .

37. Both parties cite the Court to *Wendy's of Fort Wayne, Inc. v. Fagan,* 644 N.E.2d 159, 161 (Ind. Ct. App. 1994). It has similar, but not exactly the same facts, as this case. In that case, the

Court of Appeals allowed a directional sign to be placed in an ingress/egress easement, but somewhat surprisingly, not to put utilities underneath the ground. That Court said 'A sign directing customers and suppliers to a road is necessary to fulfill the easement's purpose of providing ingress and egress to Fagan's business. If customers cannot find the road, they cannot find Fagan.' Hicks attempts to distinguish the *Wendy's* case by the difference in sign size and [sic] broader in scope. However, *Wendy's* stands for same language as this one—ingress and egress. *As to the sign, it was there in existence when and even 5 years continuously prior to Hick[s's] purchase. Moreover, Hicks took the risk of purchasing the property without seeking a survey and then even still erecting [its] building knowing full well of the sign's placement in the ingress/egress easement and lastly, placing [its] sign on the same site line as the existing Holiday Inn sign. The Court of Appeals stated in Wendy's an ingress/egress easement allows for a directional sign.* Carewell's sign is a directional sign.

. . .

JUDGMENT

The Court now enters judgment in favor of Defendant/Counter Claimant Carewell. The Court enters a Declaratory Judgment pursuant to I.C. 34-14-1-2 and Quiet Title pursuant to IC 32-30-2-1 in favor of Carewell in that it may continue to use, maintain, replace sign as needed. . . . Plaintiff's claims for relief are denied.[2]

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[2] The trial court determined that Carewell would also prevail under the theory of an implied easement of prior use. However, both parties point out—and we agree—that this alternative theory for the trial court's judgment is erroneous. Because there was no common ownership of the fee simple interest of the driveway easement real estate by Carewell when the Holiday Inn sign was constructed, the doctrine of implied easement of prior use does not apply. *See, e.g., Hysell v. Kimmel,* 834 N.E.2d 1111, 1114 (Ind. Ct. App. 2005) (holding that the following elements are necessary to establish an implied easement of prior use: (1) there was a common ownership at the time the estate was severed; (2) the common owner's use of part of his land to benefit another part was apparent and continuous; (3) the land was transferred; and (4) at severance it was necessary to continue the preexisting use for the benefit of the dominant estate), *trans. denied.*

Appellant's Appendix Vol. II at 11-17 (emphases added). Hicks now appeals.

Discussion and Decision

A. Standard of Review

[14] When a trial court enters findings of fact and conclusions of law, those findings are to be liberally construed to support the judgment. *DeGood Dimensional Concepts, Inc. v. Wilder,* 135 N.E.3d 625, 631 (Ind. Ct. App. 2019). On appeal, we apply the following two-tiered standard of review: "we must first determine whether the evidence supports the findings and second, whether the findings support the judgment." *In re Adoption of E.B.,* 163 N.E.3d 931, 936 (Ind. Ct. App. 2021); *see also* Indiana Trial Rule 52(A).

[15] A trial court's findings will not be overturned unless they are clearly erroneous. *DeGood,* 135 N.E.3d at 631. Factual findings are clearly erroneous if the record lacks any evidence or reasonable inferences to support them and a judgment is clearly erroneous when it is unsupported by the findings of fact and the conclusions relying on those findings. *Id.* at 632-33. A judgment is also clearly erroneous if the trial court applies the wrong legal standard to properly found facts. *Id.* We evaluate questions of law de novo and owe no deference to a trial court's determination of such questions. *Jones v. Von Hollow Ass'n, Inc.*, 103 N.E.3d 667, 671 (Ind. Ct. App. 2018).

[16] Additionally, we note that Hicks is appealing from a negative judgment. A judgment entered against a party who bore the burden of proof at trial is a

negative judgment. *DeGood,* 135 N.E.3d at 632. On appeal, we will not reverse a negative judgment unless it is contrary to law. *Id.* A party appealing from a negative judgment must show that the evidence points unerringly to a conclusion different than that reached by the trial court. *Id.*

A. Holiday Inn Sign and the Easement

[17] In determining whether the trial court properly concluded that Carewell's continued use and maintenance of the Holiday Inn sign in its current location did not violate the easement, we initially observe that easements are limited to the purpose for which they are granted. *Kwolek v. Swickard*, 944 N.E.2d 564, 570 (Ind. Ct. App. 2011), *trans. denied*. The owner of an easement, known as the dominant estate, possesses all rights necessarily incident to the enjoyment of the easement. *Rehl v. Billetz*, 963 N.E.2d 1, 6 (Ind. Ct. App. 2012). The owners of the property over which the easement passes, known as the servient estate, may use their property in any manner and for any purpose consistent with the enjoyment of the easement, and the dominant estate cannot interfere with the use. *Id.* All rights necessarily incident to the enjoyment of the easement are possessed by the dominant estate owner. *Id.* It is the servient owner's duty to permit the dominant owner to enjoy the easement without interference. *Id.*

[18] Both parties direct us to this court's opinion in *Wendy's of Fort Wayne v. Fagan*, 644 N.E.2d 159 (Ind. Ct. App. 1994), in support of their respective positions. In that case, a Wendy's restaurant submitted a development plan to the Allen County Plan Commission (Plan Commission) that related to the construction of

a new restaurant adjacent to a tract of land that Fagan owned. *Id.* at 160. The Plan Commission required Wendy's to grant Fagan an easement across its parcel to provide access to Fagan's property. *Id.*

[19] Fagan operated an automotive center on his parcel. Thus, in compliance with the Plan Commission's requirement, Wendy's executed the following easement to Fagan:

> [A] permanent easement and right-of-way for the purpose of ingress and egress from the real estate. The Easement shall be for the non-exclusive use and benefit of [Fagan], and [Wendy's] reserves the right of use of the real estate contained within the Easement not inconsistent with this grant and for purposes of ingress and egress from any part of or all of the land owned by the [Wendy's] abutting or adjoining the Easement. *The Easement shall include the right in [Fagan], its successors and assigns forever, to enter upon and within the Easement; to maintain and repair any roadway, street or drive constructed over and along the Easement; and to do all things necessary in regards thereto.*

Id. at 160 (emphasis added).

[20] Fagan asserted that the easement permitted him to install a 52" sign and necessary utilities along the easement. After Wendy's denied the local utility approval to proceed and claimed that Fagan had no right to construct the proposed sign, Fagan sued Wendy's for injunctive relief and a declaratory judgment to determine whether he had a right to install the utilities and build the sign. *Id.* In construing the scope of the easement, the trial court determined that "Fagan had a right to install utilities and . . . the directional

sign because these rights were necessary to the complete and beneficial use of the real estate for a retail establishment." *Id.* at 161.

[21] Wendy's appealed, and a panel of this court determined that the easement did not include the unlimited right to install utilities because utilities were not necessary to effectuate the purpose of the easement, which was to grant access to Fagan's property. *Id.* at 162. On the other hand, we held that the terms of the easement permitted Fagan to install its sign. More particularly, it was determined that

> In regard to the proposed 52 inch electrified sign, we find that Fagan does have the right to erect the directional sign in the easement because that use is incidental to making the grant of ingress and egress effectual. Indiana cases clearly have held that the owner of an easement possesses all rights necessarily incident to the enjoyment of the easement and that he may make such repairs, improvements, or alterations as are necessary to make the grant of easement effectual. Here, the road on the easement is the only entrance to Fagan's property and business which is located approximately 261 feet from Liberty Mills Road Extended, the only public street. *A sign directing customers and suppliers to that road is necessary to fulfill the easement's purpose of providing ingress and egress to Fagan's business. If customers cannot find the road, they obviously will not be able to use it to go to and from Fagan's automotive center. Thus, the purpose of the easement which is to provide Fagan's employees, customers, suppliers, and others access to his property, would be rendered virtually meaningless without the installation of a directional sign.*

Id. at 162-163 (citations omitted) (emphasis added).

[22] Hicks maintains that the circumstances here differ significantly from those in *Wendy's* because: (a) the sign erected in *Wendy's* was smaller and less burdensome than the Holiday Inn sign; (b) unlike Fagan in the *Wendy's* case, Carewell does not need a sign on the easement to use and enjoy its right to ingress and egress over Hicks's property; and (c) the scope and purpose of the easement grant in *Wendy's* are broader than those in this situation.

[23] Notwithstanding Hicks's contentions, we note that the language of the easement here specifically authorized Carewell to "freely use and enjoy" the ingress/egress easement "for such use and purpose as are common to commercial driveways generally." *Appellant's Appendix Vol. II* at 91. The easement language in *Wendy's* did not contain such broad language, yet this court affirmed the trial court's conclusion that the rights therein *included* the right of Fagan to install the sign to permit its customers to locate the driveway to the business.

[24] Here, the evidence presented at trial established that Carewell's Holiday Inn sign serves the same purpose as did Fagan's directional sign. In other words, it was shown that for Holiday Inn guests who are traveling on U.S. 231, the only means of accessing the hotel is to turn east from the intersection of U.S. 231 and CR 900 North. And once a guest proceeds east of CR 900 North, the sign identifies the location of the Holiday Inn driveway. Absent the sign, Holiday Inn's suppliers and customers would not know where to turn to access the hotel.

[25] Finally, while Hicks claims that the trial court's judgment must be reversed because Holiday Inn's directional sign is larger than that which was placed on the property in *Wendy's,* the evidence showed that the Holiday Inn directional sign assists customers traveling from I-70 to locate the driveway. Given the distance to the Holiday Inn from I-70, the evidence established that a smaller sign would not serve the same function. Without the sign, the very purpose of the ingress/egress easement would essentially be rendered meaningless. And Hicks presented no evidence that the placement of the sign hindered his use of the easement.

[26] In sum, the evidence presented at trial supports the trial court's determination that the Holiday Inn sign is necessary to fulfill the purpose of the easement. As a result, we conclude that the evidence supported the trial court's findings of fact and those findings supported its judgment that Carewell's continuing use of the Holiday Inn Sign within the ingress-egress easement is a matter of right and not a trespass. For these reasons, we decline to disturb the trial court's judgment.

[27] Judgment affirmed.

Kirsch, J. and Weissmann, J., concur.