IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 23, 2014 Session

THOMAS HAGER, ET AL. v. JOHN GEORGE

Appeal from the Chancery Court for Davidson County
No. 13295II Carol L. McCoy, Chancellor

No. M2013-02049-COA-R3-CV - Filed July 8, 2014

This case involves a dispute regarding the use of an abandoned county road. The road runs through the land of John George, Appellee, who sought to deny his neighbors, Thomas and Bobbye Hager, Appellants, access to the road. The Hagers brought suit claiming they had acquired rights to use the road through adverse possession, a private access easement pursuant to the abandonment of a public road, or a prescriptive easement. The trial court found that the Hagers had established the creation of a prescriptive easement but limited their right to maintain the easement to emergency conditions only. The Hagers argue that the trial court erred in restricting their ability to reasonably maintain the easement. Mr. George contends that the trial court erred in finding the Hagers had acquired rights in the road through a prescriptive easement. We find that the trial court correctly held that the Hagers acquired a prescriptive easement but that a right to conduct reasonable maintenance is a necessary incident of an easement by prescription. Accordingly, we affirm in part, reverse in part, and remand to the trial court for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part; Reversed in Part; and Remanded

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ. joined.

Stephen E. Grauberger, Mt. Juliet, Tennessee, for the appellants, Thomas Hager and Bobbye Hager.

Frank E. Mondelli Sr., Nashville, Tennessee, for the appellee, John George.

OPINION

I. BACKGROUND

Appellants, Thomas and Bobbye Hager, have owned property in Hermitage, Tennessee since 1970. Over the course of the forty-three years that the Hagers have resided there, they have made use of an abandoned county road as the exclusive means of ingress and egress to their property. The abandoned road in question runs from John Hagar Road directly to the Hagers' property and then turns right to a landlocked property owned by Ms. Georgia Woods, who also makes use of the road to access her property. It is undisputed that the road runs, at least in part, on the land of Appellee, John George, who has owned his property since 1997. At trial, Steve Hagar, Mr. George's predecessor in interest, testified that he had regularly observed the Hagers' use of the old road, but he had never given them permission to do so. At some point, Davidson County widened John Hagar Road, which abuts both the Hagers' and Mr. George's properties, and stopped maintaining the road at issue. In 1992, the Metropolitan Government of Nashville and Davidson County ("Metro") closed the road but retained easements for utilities and contractors. While the road originally ran more or less on the Hager/George property line, it has gradually shifted further onto Mr. George's property.

The Hagers continued to make use of the abandoned county road without objection until 2012, when a dispute arose with Mr. George regarding some political signs. As a result of the dispute, Mr. George sought to deny the Hagers access to the old county road. In response, the Hagers filed a verified complaint on March 7, 2013, requesting the trial court to confirm their right to use the abandoned road to access their property under the alternate theories of adverse possession, prescriptive easement, or as a private access easement based on the abandonment of a public road. They also requested that the trial judge grant them an *ex parte* restraining order, temporary injunction, or permanent injunction preventing Mr. George from interfering with their use of the abandoned road. Mr. George responded by filing a motion for temporary injunction on March 12, 2013, seeking to prevent the Hagers from using the abandoned road pending the outcome of the dispute.[1] Mr. George also filed a counter-complaint with his answer, seeking $10,000.00 for intentional trespass and

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[1]The trial court ultimately ruled on this issue in favor of the Hagers, granting them a temporary injunction upon the posting of a bond. The injunction prohibited Mr. George "from interfering or obstructing the Hagers, their family, guests, or invitees in any manner from utilizing the former county road which crosses Mr. George's property for the ingress and egress of [the Hagers'] property, or harassing the Hagers, their family, guests, or invitees in any manner . . . ."

property damage allegedly caused by the Hagers, a permanent injunction prohibiting their use of the road, and attorney's fees.

The Chancery Court for Davidson County heard the case on May 29, 2013, and issued a ruling in favor of the Hagers on June 20, 2013. In its Final Order, the trial court found that the Hagers had failed to demonstrate that they had taken ownership of the land by adverse possession. The trial court also refused to grant them a private access easement based on the abandonment of the once-public road. However, the court found that the Hagers acquired an easement by prescription to use the abandoned road for the purposes of ingress and egress to their property. The trial court also concluded that, "given Mr. George's express intent to abandon the road, and that the prescriptive easement is for use only, [the Hagers] have no right to maintain the road in any manner and may not trim bushes or trees, gravel the road, [or] remove any naturally occurring obstacles on the road."

In response to the trial court's ruling limiting the Hagers' right to maintain their easement, they filed a Motion to Alter or Amend pursuant to Rule 59.04 of the Tennessee Rules of Civil Procedure. The trial court amended its ruling by stating that the Hagers could maintain the easement by "remov[ing] for emergency conditions only, (*i.e.*: fallen trees, fallen limbs), for such use as to the prescriptive easement." The Hagers duly filed a notice of appeal arguing that a right to reasonable maintenance of the road is a necessary incident to their prescriptive easement. Mr. George contends that the trial court erred in granting the Hagers a prescriptive easement and, even assuming such an easement was properly granted, they should have no right to maintain it.

II. ANALYSIS

The issues on appeal are: (1) whether the trial court correctly granted the Hagers a prescriptive easement; and (2) whether the right to reasonable maintenance is a necessary incident to a prescriptive easement.

A. Standard of Review

The standard of review of a trial court's findings of fact is *de novo* with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001); *Fowler v. Wilbanks*, 48 S.W.3d 738, 740 (Tenn. Ct. App. 2000). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999). Where the trial court does not make findings

of fact, there is no presumption of correctness, and "we must conduct our own independent review of the record to determine where the preponderance of the evidence lies." *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). Issues of law are reviewed *de novo* with no presumption of correctness. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000); *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

Here, neither party disputes the trial court's factual findings. The parties each take issue with the trial court's conclusions of law.

B. Prescriptive Easement

An easement creates an enforceable right to use another's property for a specific purpose. *Pevear v. Hunt*, 924 S.W.2d 114, 115 (Tenn. Ct. App. 1996) (citing *Brew v. Van Deman*, 53 Tenn. (6 Heisk.) 433, 436 (1871)). A right of way across another's property is the most common form of easement. *Shew v. Bawgus*, 227 S.W.3d 569, 578 (Tenn. Ct. App. 2007) (quoting *Stinson v. Bobo*, No. M2001-02704-COA-R3-CV, 2003 WL 238723, at *3 (Tenn. Ct. App. Feb. 4, 2003)). The State of Tennessee recognizes several methods by which an easement may be created: (1) express grant; (2) reservation; (3) implication; (4) prescription; (5) estoppel; and (6) eminent domain. *Cellco P'ship v. Shelby Cnty.*, 172 S.W.3d 574, 588 (Tenn. Ct. App. 2005) (citing *Pevear*, 924 S.W.2d at 115-16).

"A prescriptive easement is an implied easement premised upon the use of another's property rather than the language in a deed." *Shew*, 227 S.W.3d at 578 (quoting *Stinson*, 2003 WL 238723, at *3). The creation of a prescriptive easement requires that the use of the property be, for the full prescriptive period, "adverse, under a claim of right, continuous, uninterrupted, open, visible, exclusive, and with the knowledge and acquiescence of the owner of the servient estate." *Pevear*, 924 S.W.2d at 116 (citing *Keebler v. Street*, 673 S.W.2d 154, 156 (Tenn. Ct. App. 1984)); *see also House v. Close*, 346 S.W.2d 445, 447 (Tenn. Ct. App. 1961). "[T]he prescriptive period in Tennessee is 20 years." *Pevear*, 924 S.W.2d at 116 (citing *Callahan v. Town of Middleton*, 292 S.W.2d 501, 509 (Tenn. Ct. App. 1956)).

A party claiming a prescriptive easement bears the burden of proving each element through clear and convincing evidence. *Stone v. Brickey*, 70 S.W.3d 82, 86 (Tenn. Ct. App. 2001). "Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Furlough v. Spherion Atl. Workforce, LLC*, 397 S.W.3d 114, 128 (Tenn. 2013) (quoting *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)). The evidence must create a high probability of the truth of the facts asserted, leaving the moving party with a heavy burden and a high bar for obtaining relief. *Id*.

Here, Mr. George argues that the trial court erred as a matter of law because exclusive use could not be shown under the factual findings. Despite abandoning the road, Metro retained easements for utilities and contractors, and Mr. George posits Metro's retention of any easement on the abandoned road precluded the Hagers from establishing the exclusiveness of their use. Therefore, our inquiry focuses on the exclusivity element of a prescriptive easement.

This Court has found that "the use and enjoyment which will give title by prescription to an easement or other incorporeal right is substantially the same in quality and characteristics as the adverse possession which will give title to real estate." *House*, 346 S.W.2d at 447-48; *but see Cumulus Broad., Inc. v. Shim*, 226 S.W.3d 366, 378 (Tenn. 2007) ("[T]he primary distinction is that the adverse possessor *occupied* the land of another, whereas, in prescription, there is merely the adverse *use* of the land of another."); *Gore v. Stout*, No. M2006-02111-COA-R3-CV, 2008 WL 450597, at *12 (Tenn. Ct. App. Feb. 19, 2008) (noting that "there is a distinction between the exercise of possession and control necessary to establish adverse possession and the continuous use element of easement by prescription"). However, while there is substantial overlap between the two concepts, they are not entirely congruent:

> Exclusivity, as an element of prescriptive easement, differs from that in adverse possession, in that the exclusivity need not be absolute in use; rather, it need only be a claim of right independent of all other users and not dependent upon a similar use in others. In other words, the term "exclusive" does not mean that the easement must be used by one person only, but simply that the right shall not depend for its enjoyment on similar rights in others; it must be exclusive as against the community or public at large. The claimant must show that his or her use is exclusive in the sense that his or her claim of right would have to be particular to himself or herself as opposed to arising simply as a member of the general public.

28A C.J.S. *Easements* § 35 (2014) (footnotes omitted).

In *House v. Close*, 346 S.W.2d 445 (Tenn. Ct. App. 1961), it was argued that a claim of easement by prescription must fail where others have also made use of the right of way because such use lacks the exclusivity necessary to give rise to such an easement. 346 S.W.2d at 448. We rejected this argument, holding that, "use may be exclusive in the required sense even though it is participated in by the owner of the servient tenement or by owners of adjoining land." *Id.*; *see Stone*, 70 S.W.3d at 86-87 ("[T]he term 'exclusive' does not mean that the easement must be used by the claimant only. It simply means that the claimant's right does not depend on a similar right in others."). The key determination in the

exclusivity inquiry, as it relates to a prescriptive easement, is whether the use is "exclusive as against the community or public at large," and that the right of use does not depend upon a similar right in others. *House*, 346 S.W.2d at 448; *Stone*, 70 S.W.3d at 86-87.

Although *House* dealt with the issue of exclusivity where others are making use of the same right of way, rather than the current situation where other easements are impacting the same right of way, it remains instructive on the issue. The Hagers' right to use the land depends in no way on Metro's retention, exercise, or abandonment of its easements, nor does their use of the right of way arise from the existence of Metro's easements. Any right that the Hagers have to use the land is independent and exclusive of that of Metro.

We find that the trial court correctly granted the Hagers a prescriptive easement in the use of the abandoned county road for the ingress and egress to their property. While Mr. George contends that the Hagers failed to prove the exclusivity element necessary to establish a prescriptive easement, nothing in the trial court's finding concerning Metro's easements precludes the Hagers from proving their exclusive use of the land in the sense necessary to establish a prescriptive easement. Therefore, we affirm the trial court's ruling with respect to this issue.

C. Right to Maintain a Prescriptive Easement

The trial court erred in restricting the Hagers' right to maintain their prescriptive easement by allowing them to "remove for emergency condition(s) only, (*i.e.*: fallen trees, fallen limbs), for such use as to the prescriptive easement." It is the generally accepted rule of law that the owner of an easement may make reasonable maintenance as necessary for its use. *Yates v. Metro. Gov't of Nashville & Davidson Cnty.*, 451 S.W.2d 437, 441 (Tenn. Ct. App. 1969). This rule has been explained as follows:

> The owner of the dominant estate may do whatever is reasonably necessary to the enjoyment of the easement and to keep it in a proper state of repair, provided it is done without imposing unnecessary inconvenience on the owner of the fee, the extent of the easement is not thereby enlarged, and the right of the owner of the fee also to make repairs is not unreasonably interfered with.
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> When easement maintenance or repair is necessary in order for the dominant tenement owner to retain the enjoyment of the estate, the dominant tenement owner may enter upon the servient tenement to perform such maintenance and repair, while in the process doing no unnecessary injury to the servient estate. The owner of an easement has the right to enter the

> servient estate in order to maintain, repair, or protect the easement, but the easement owner may do so only when necessary and in a reasonable manner as not to increase needlessly the burden of the servient estate.

28A C.J.S. *Easements* § 227 (2014) (footnotes omitted). This right of maintenance is based on the theory that obstruction of the easement "constitutes a private nuisance which the owner of the easement is entitled to abate under the rules applicable to nuisances generally, and in doing so, he or she does not become a trespasser." 25 Am. Jur. 2d *Easements and Licenses* § 89 (2014).

In *Rollins v. Electric Power Board of the Metropolitan Government of Nashville & Davidson County*, No. M2003-00865-COA-R3-CV, 2004 WL 1268431 (Tenn. Ct. App. June 8, 2004), we held that the holder of a prescriptive easement has a right to reasonable maintenance. 2004 WL 1268431, at *5. As to its scope, we stated that "[t]he holder of an easement has the right to use or alter the affected premises only as reasonably necessary for the use of the easement." *Id*. The justification for this holding lies in the fact that a prescriptive easement creates property rights in its holder, "expressed not in terms of possession or occupancy but in terms of use." *Id*. at *6. These rights are interfered with, not necessarily when the owner of the servient tenement occupies the land, but when the easement holder's use of the easement is prevented or interfered with by the owner or other naturally-occurring conditions. *See id*. at *6. The easement holder may exercise this right to use or maintain the easement without providing notice to the property owner or seeking the property owner's permission or consent so long as the maintenance is reasonably necessary, conducted in a reasonable manner, and does not breach the peace. *Id*. at *5-6.

We find that the trial court's order was overly restrictive of the Hagers' right to reasonably maintain the abandoned county road. In holding that the Hagers may conduct maintenance to remedy "emergency conditions only," the trial court's order prohibits them from performing any number of activities that may be reasonably necessary to the use of their easement. A right to reasonable maintenance arises as a necessary incident to a prescriptive easement, and therefore, we must reverse the trial court's decision in part.

Because of the existence of other easements impacting the abandoned county road, we decline to specify the precise contours of the Hagers' right to maintain their prescriptive easement. The trial court should allow such maintenance and repair of the easement as reasonably necessary for ingress and egress taking into consideration the easements held by other parties.

III. CONCLUSION

For the foregoing reasons, the trial court's judgment is affirmed in part, reversed in part, and this matter is remanded for further proceedings consistent with this opinion. Costs of this appeal are taxed to the appellee, John George, for which execution may issue, if necessary.

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W. NEAL McBRAYER, JUDGE