IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 9, 2001 Session

WAYNE FANNING, ET AL. v. SHIRLEY B. WALLEN

Appeal from the Chancery Court for Cocke County
No. 00-006 Telford E. Forgety, Jr., Chancellor

FILED AUGUST 21, 2001

No. E2001-00228-COA-R3-CV

This case involves a dispute over a right-of-way. Following a bench trial, the court below decreed that the plaintiffs, Wayne Fanning and wife, Janet Fanning, have a 40-foot right-of-way across two tracts of land owned by the defendant, Shirley B. Wallen, providing access from the plaintiffs' property to a public road. The defendant appeals, arguing that the original reservation of the right-of-way by the defendant's grantor was not valid. The defendant further argues that, even if the reservation of the right-of-way was valid, the trial court erred in locating it as the court did. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS and D. MICHAEL SWINEY, JJ., joined.

Ben W. Hooper, III, Newport, Tennessee, and Thomas N. McAdams, Knoxville, Tennessee, for the appellant, Shirley B. Wallen.

Robert N. Goddard, Maryville, Tennessee, for the appellees, Wayne Fanning and wife, Janet Fanning.

OPINION

I.

The dispute in this case implicates four tracts of land: the plaintiffs' tract of approximately 8.43 acres and three smaller tracts owned by the defendant, which smaller tracts we shall refer to as Lot 1A of the Smoky Mountain Golf Club Subdivision ("Lot 1A"), Tract 2, and Tract 3. The trial court held that the plaintiffs' right-of-way crosses both Tract 3 and Lot 1A. A sketch, drawn to scale, showing the relevant portions of the implicated four parcels of property, is attached as Appendix A to this opinion.

The plaintiffs' property is an irregularly-shaped tract, the westernmost portion of which abuts Golf Course Road, which road runs generally north and south. A portion of the southernmost boundary line of the plaintiffs' property extends generally in an easterly direction from Golf Course Road for approximately 249 feet before that line "doglegs" in a southeasterly direction for 402 feet. The subject property line then continues northeasterly in an irregular fashion along English Creek. This last direction is not relevant to this litigation; hence, it is not fully reflected on Appendix A.

The defendant's three tracts of land lay generally to the south and southwest of the plaintiffs' property and are situated between Golf Course Road and the 402-foot southeasterly running boundary line of the plaintiffs' property. Tract 3 lays almost directly south of the 249-foot boundary line of the plaintiffs' property. Tract 3 "doglegs" to the right, adjoining the 402-foot southeasterly running boundary line of the plaintiffs' land. A house is located on Tract 3; it is situated near the westernmost property line of that tract, facing Golf Course Road. Tract 2 lays generally to the south and southwest of Tract 3. Lot 1A is triangular in shape, with its western boundary along Golf Course Road. The northernmost tip of Lot 1A is located almost directly in front of the house on Tract 3. The semi-circular driveway in front of that house crosses the northern portion of Lot 1A. The eastern property line of Lot 1A extends southeasterly along the western boundary line of Tract 2.

Both the plaintiffs' property and the defendant's Tract 3 were owned at one point in time by Ruth Caroline Barrick. In 1974, Barrick conveyed Tract 3 to the defendant. The deed describes a point in the eastern boundary of Tract 3 abutting what is now the plaintiffs' property as "a point in the center of a 40 foot right-of-way." The deed further states, in pertinent part, as follows:

> [Barrick] reserves a right-of-way 40 feet in width across the above described premises [*i.e.*, Tract 3] to the Golf Course Road for access to her remaining property.

The sales contract for this transaction, which was entered into a month prior to the conveyance, provides, in pertinent part, as follows:

> It is further agreed that [Barrick] will have a right-of-way or easement to the Golf Course Road in a direct line for the benefit of her remaining property. The right-of-way will also be surveyed out at the time the property to be sold is surveyed. Said right-of-way to be 40 feet in width.

There is no indication in the record that the right-of-way was ever surveyed as required by the contract.

The plaintiffs purchased their property from Barrick in 1977. Their deed recites, in pertinent part, as follows:

> There is also conveyed the right to use jointly with grantor, her heirs and assigns, a 30 foot right of way from the River Road to the corner of the Fish property and *a 40 foot right of way* along the Fish property fence line, around a bluff along the Chaney fence line and across English Creek at or near a stand pipe and *thence to the Golf Course Road through the property of the grantor and property previously sold by her to Shirley Wallen.*

(Emphasis added).

Tract 2 and Lot 1A were conveyed to the defendant in 1967 by Brown Breeden. The chain of title reflects that Tract 2 had been conveyed to Brown Breeden in 1960 by Barrick. Both the 1960 and 1967 deeds refer to "a stake in the center of the forty (40) foot road" along the northern property line of Tract 2, abutting the southern boundary of Tract 3. The chain of title for Lot 1A reflects that it was conveyed by Smoky Mountain Golf Club, Inc., to Brown Breeden in 1964. The 1964 and 1967 deeds pertaining to Lot 1A recite that the property is "subject to an easement for a 50-foot road across the northern most portion of said lot as shown on said plat." On the referenced recorded plat, a line has been drawn across the northern portion of Lot 1A to apparently reflect this easement.

At the trial below, the plaintiffs maintained that the disputed right-of-way begins at an iron pin on the easternmost boundary line of Tract 3 and traverses Tract 3 in a diagonal line running generally in a southwesterly direction to the eastern boundary of Lot 1A, at which point the right-of-way angles slightly and traverses the northern part of Lot 1A before ending at Golf Course Road. The defendant, on the other hand, maintained that the purported grant of a right-of-way to the plaintiffs was not valid and that, therefore, no such right-of-way exists. In the alternative, the defendant proposed that the right-of-way, while beginning at the same starting point on the eastern boundary of Tract 3 and ending in the same area on the western boundary of Lot 1A, should traverse Tract 3 to the northeastern corner of Tract 2 and proceed directly west, straddling a property line between Tracts 2 and 3 before intersecting Lot 1A.

In support of their theory of the location of the right-of-way, the plaintiffs presented the testimony of Charles Rusk, a surveyor. During the course of his field study of the parties' properties, Rusk located an iron pin on the eastern boundary line of Tract 3, which pin, he testified, corresponds with a call in the defendant's deed referring to "a point in the center of a forty foot right-of-way." He further found evidence of an old road, approximately 12 feet in width, on the plaintiffs' property east of this pin. Rusk testified that he also found evidence consistent with the existence of an old roadway in Lot 1A and Tract 3. Specifically, he found that "there was a fill as if that road had been graded and the spoil material had been dropped over the side to level up the travel way so that vehicles could travel it without undue inconvenience." Rusk introduced a series of photographs illustrating the evidence that he found of the roadway. Rusk testified that he removed several dead trees from the way and was able to drive his pickup truck on it. He testified that excavation would not be necessary in the area to make it a passable roadway.

Rusk also examined the area that the defendant maintains should be designated as the right-of-way. He opined that the area was "not...user friendly for traveling" and that, given its "considerable grade" would require excavation in order to make it passable for a vehicle.

Rusk acknowledged that it would be possible to confine the right-of-way to the boundaries of Tract 3, but that the right-of-way would cross the defendant's front lawn and driveway, which, in Rusk's opinion, would diminish the value and utility of the defendant's property.

Mr. Fanning testified that when he and his wife purchased their property from Barrick in 1977, he and Barrick walked the right-of-way over the defendant's properties and that the path they walked was the same path located by Rusk on his survey. Since purchasing the property, Mr. Fanning testified that he had walked the right-of-way "over the years," although he had never used it for vehicle access.

The defendant testified that when she purchased Tract 3, Barrick did not point out to her where the right-of-way would be located. She testified that she has never observed the area identified by Rusk being used as a travel way and that the area had been used as a garden by her tenants.

The defendant also presented the testimony of surveyor Hassel T. Wolfe to support her proposed location of the right-of-way. Wolfe testified that the defendant's location of the right-of-way is based upon the "oldest evidence" that he could find, that is, the reference in the deeds to Tract 2 to a stake in the northern boundary of Tract 2 being in the center of a 40-foot road. Wolfe testified that he assumed that the road referred to in the deeds was travelable and that it constituted the basis of Barrick's reservation of a right-of-way. He admitted on cross-examination, however, that the deed to Tract 3 did not make any reference to a 40-foot road on its southern boundary.

Wolfe denied that the grade of the area located by him was too significant to be traversed. He admitted that there was little evidence of any activity in the area, but noted that "we had evidence from people by deed that said in twenty-five years previous it was a road." Wolfe also admitted that both his and Rusk's locations of the right-of-way encroached upon a 23-inch cedar tree near the defendant's house.

Following the conclusion of the proof, the trial court announced its findings:

> The conclusion that I'm compelled to come to is that the preponderance of the evidence here is that the right-of-way is in the location testified to by Mr. Rusk. As I said in my comments to counsel here, we know where the road is. There's no dispute where the road comes out on Golf Course Drive. Mr. Wolfe tied that down for sure. And that's the same place where Mr. Rusk feels it comes out. We know where the road is on the eastern boundary of Mrs. Wallen's property. We agree on that. Her own deed calls for the

center line of a road there. It's only between those two points that we have a dispute. Between those two points the evidence is not as good as the Court would like for it to be for sure.

But here's what I do have. I do have in the vicinity of that eastern boundary of Mrs. Wallen's property, even according to her own surveyor's testimony, there is evidence of grade work, of a travelable surface, at least in the area of that point on the eastern most, her eastern most boundary line. Evidence that there's been cut, there's been fill, an easily according to him, although grown up with weeds, an easily travelable roadway leading to the west in the direction of where we know the road comes out at the twenty-three inch cedar.

Now Mr. Rusk has filed a series of photographs which depict he says the roadway, the evidence that leads him to conclude that that is the location of the roadway. Some of those pictures are less compelling than others but some the Court deems to be fairly clear....

* * *

The long and short of it [is that it] sure does look like an area that somebody has used as a right-of-way at some point in time.

I come to this conclusion not without a great deal of sympathy for Mrs. Wallen. There's trees out there, dogwoods, elms, nine inch black locusts that may be affected. I hope they don't have to be. I wish the parties could have come to some resolution of this matter to move this right-of-way one way or the other a little bit and maybe do something about the expense of fixing it to where there's some access. But that's something the Court cannot force the parties to do. That's something they've got to do on their own. And the Court recognizes there's this rule that where a right-of-way is indefinite that the Court must locate it in such a way as to be least injurious to the servient tenement and that's all well and good. But if there is evidence of practical location then that is the better way to locate an easement because that is evidence that the parties themselves had located it. That is, that they've located an easement in the place where they put it in fact. And the evidence preponderates here that such a roadway as there was is in the location indicated by Mr. Rusk....

This appeal followed.

II.

Our review of this non-jury case is *de novo* upon the record of the proceedings below; however, that record comes to us with a presumption that the trial court's factual findings are correct. Tenn. R. App. P. 13(d). We must honor this presumption unless we find that the evidence preponderates against the trial court's findings. ***Id.***; ***Union Carbide Corp. v. Huddleston,*** 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law are accorded no such deference. ***Campbell v. Florida Steel Corp.,*** 919 S.W.2d 26, 35 (Tenn. 1996).

III.

The defendant first argues that the original reservation of the right-of-way was not valid, because, so the argument goes, Barrick and the defendant mistakenly believed that Barrick owned Lot 1A and thus Barrick had mistakenly reserved a right-of-way over land that she did not own.

The defendant's argument presupposes that, at the time of the conveyance of Tract 3 to the defendant, the parties intended the right-of-way to pass through Lot 1A. If that were the case, the validity of at least a portion of the right-of-way would certainly be called into question as Barrick could not legally reserve a right-of-way over property that she did not in fact own. We must therefore determine whether Barrick and the defendant intended at the time of the reservation of the subject right-of-way that it would pass through Lot 1A.

In order to ascertain the intent of the parties, we look first to the language of the deed creating the servitude. *See* Restatement (Third) of Property *Servitudes* § 4.1(1) (2000) ("A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created."). The deed from Barrick to the defendant Wallen states, in pertinent part, as follows:

> [Barrick] reserves a right-of-way 40 feet in width across the *above described premises* to the Golf Course Road for access to her remaining property.

(Emphasis added). We think that the only reasonable interpretation of this language is that the right-of-way reserved by Barrick was intended to pass through the property described in that deed, *i.e.*, Tract 3. This interpretation of the defendant's deed is consistent with the language in the plaintiffs' deed, wherein the right-of-way is described as crossing the "property previously sold by [Barrick] to Shirley Wallen." This language obviously refers to one single tract, that is, the tract previously sold by Barrick to the defendant, being Tract 3. Based upon the language of these deeds from a common grantor, we cannot agree with the defendant that Barrick intended to reserve a right-of-way across property she did not own, *i.e.*, Lot 1A. Accordingly, we find the defendant's argument to be without merit.

IV.

Having found that the reservation of the right-of-way by Barrick was indeed valid, we turn to the defendant's second issue, *i.e.*, that the trial court erred in its location of the right-of-way.

In determining the location of an easement, we first look to the language of the instrument creating the easement and the circumstances surrounding its creation. *See* Restatement (Third) of Property *Servitudes* § 4.8 (2000). The parties' expressed intent "is of primary importance." Restatement (Third) of Property *Servitudes* § 4.1 cmt. d (2000).

If the location of an easement cannot be ascertained by the language of the instrument or the surrounding circumstances, the use of the way fixes the location. *See* ***Hill v. U.S. Life Title Ins. Co. of N.Y.,*** 731 S.W.2d 910, 913 (Tenn. Ct. App. 1986) ("If a right of way is decreed over the lands of another, it is not necessary for the parties expressly to designate its location, but it is sufficient if a right-of-way is used and acquiesced in. The use fixes the location.") (quoting ***Richardson v. Bristol Land & Improvement Co.,*** 1 Tenn. App. 671, 690 (1926)). If there has been no prior use, the location of the right-of-way is determined as follows:

> When no prior use of the way has been made, and the same is to be located for the first time, the owner of the land over which the same is to pass has the right to choose it, provided he does so in a reasonable manner, having due regard to the rights and interests of the owner of the dominant estate. But, if the owner of the land fail[s] to select such way when requested, the party who has the right thereto may select a suitable route for the same, having due regard to the convenience of the owner of the servient estate.
>
> Where...there has been no location, and prior travel has been along no particular or definite route, it would seem that the court when called on to locate should defer to the selection of the landowner, if that be reasonable....
>
> The route when thus fixed by the court is to be determined, however, not by the sole interest of either of the parties, but by the reasonable convenience of both.

McMillan v. McKee, 129 Tenn. 39, 42, 164 S.W. 1197, 1198 (1914) (internal quotation marks and citations omitted).

The defendant contends that the trial court erred in locating the right-of-way based upon evidence of its "practical location," *i.e.*, its purported use by the parties and their predecessors, and that the trial court should have placed the right-of-way in the location selected by the defendant, which she contends is the least injurious to her property.

We begin our analysis where the applicable principles begin, *i.e.*, with an examination of the language of the deed reserving the right-of-way and the circumstances surrounding the reservation. As we have already discussed, the reservation in the defendant's deed provides that the right-of-way is to cross the premises described in the deed, *i.e.*, Tract 3. The deed to the defendant conveying Tract 3 also refers to a point on the tract's eastern boundary as a point in the center of a 40-foot right-of-way. The sales contract executed by the defendant and Barrick prior to the execution of the deed provides that the right-of-way is to be in a "direct line" across Tract 3. These facts, coupled with the evidence of the roadbed and Mr. Fanning's testimony that at the time of his purchase from Barrick he walked with her along the area designated by Rusk as the right-of-way and that he had used the right-of-way "over the years," leads us to conclude that the evidence does not preponderate against the trial court's location of the right-of-way across Tract 3.

The right-of-way as located by the trial court also crosses the northern portion of Lot 1A, even though, as we have previously noted, that property was not and could not have been implicated in the original reservation. Despite this apparent anomaly, the evidence does not preponderate against the trial court's decision to locate the right-of-way in this manner. The proof at trial indicated that to place the right-of-way solely within the boundaries of Tract 3 would require a near 90-degree turn in the way and would encroach upon the driveway and the lawn in front of the defendant's house. While such a location would comply with the letter of the reservation, it would undoubtedly diminish the utility and value of the defendant's property. Apparently recognizing this, both sides in this litigation proposed locating the right-of-way in such a way as to avoid encroaching upon the area in front of the defendant's house. Both the plaintiffs' and the defendant's proposals locate the western end of the right-of-way across the northern portion of Lot 1A, property which, as we have previously noted, is already subject to a 50-foot wide easement in the same area.

The defendant's largess in permitting the subject right-of-way to cross Lot 1A, coupled with the trial court's locating of the way across Tract 3, completes the path of the right-of-way from the plaintiffs' property to Golf Course Road. By placing the right-of-way over a small part of Lot 1A with the acquiescence of the defendant, the trial court effectuated the parties' intent in creating the easement – to create a right-of-way in a direct line across Tract 3 – while minimizing the damage that would occur to the defendant's property if the right-of-way were located *solely* within Tract 3. Any injury to the defendant's property is further minimized by the plaintiffs' apparent willingness, as evidenced by Rusk's drawings, to use the way as a 12-foot-wide road, which should further minimize the loss of trees and avoid displacing a part of the defendant's septic field.[1] Furthermore, because the right-of-way has been placed where there is evidence of an old roadbed of a reasonable grade, no excavation will be required in order to render the way travelable, unlike the area selected by the defendant, which would require excavation to make the way passable for vehicles. Accordingly, we find and hold that the evidence does not preponderate against the trial court's findings of fact. We also hold that the trial court correctly used the applicable law in ruling as it did.

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[1]While the plaintiffs may intend at this time to limit the road to a width of 12 feet, this does not, in any way, change the fact that they have a 40-foot right-of-way as found by the trial court.

V.

The judgment of the trial court is affirmed. This case is remanded for enforcement of the judgment and for collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, Shirley B. Wallen.

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CHARLES D. SUSANO, JR., JUDGE