IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 11, 2002 Session

Norman Cooper, ET AL. v. John C. Polos, ET AL.

Appeal from the Circuit Court for Blount County
No. E-16321 W. Dale Young, Judge

FILED APRIL 3, 2002

No. E-2001-00665-COA-R3-CV

Norman and Ina Cooper ("Plaintiffs") filed this lawsuit after John Polos ("Polos") installed a gate on a right-of-way over his land utilized by Plaintiffs. According to Plaintiffs, the gate was not necessary to Polos' use and enjoyment of his land, and created a great burden on Plaintiffs to have to open and close the gate to gain entry to their land. Polos claimed the gate was necessary for his use and enjoyment of his land because of safety concerns in that the right-of-way was being used by trespassers to gain entry to his and his neighbors' land to engage in illegal activity. The Trial Court agreed with Plaintiffs, and permanently enjoined Polos from maintaining a gate on the right-of-way. This is the second appeal to this Court. We reverse the judgment of the Trial Court and remand for further proceedings.

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

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

Eugene B. Dixon, Maryville, Tennessee, for the Appellants John C. Polos and Diane Cleveland.

Arthur B. Goddard, Maryville, Tennessee, for the Appellees Norman Cooper and Ina M. Cooper.

OPINION

Background

This lawsuit started in 1993 when Plaintiffs filed a complaint against Defendants Polos and Diane Cleveland ("Cleveland") claiming Plaintiffs had a 20 foot easement over Polos' property which they used for ingress and egress onto their own property.[1] Apparently, the parties had problems with maintenance and use of the right-of-way, culminating in an agreement which stated Polos would maintain the right-of-way in such a condition that would allow Plaintiffs "free ingress and egress of passenger vehicles and farm equipment to and from the lands of the" Plaintiffs. In the complaint, Plaintiffs claimed Defendants constructed a gate across the right-of-way and thereafter informed Plaintiffs the gate would be locked and they would be furnished with a key. Plaintiffs asserted that having to pass through the gate would be a great burden on them. Plaintiffs sought a restraining order prohibiting Defendants from interfering with their use of the right-of-way and prohibiting them from maintaining a gate with or without a lock.

In their answer, Defendants pointed out that Plaintiffs already had constructed two gates across a different portion of the right-of-way. Defendants also asserted that they authorized a neighbor to construct the gate for security purposes after suspicious vehicles were observed using the right-of-way. Defendants denied the gate would create any significant burden on Plaintiffs.

The first trial was in 1994 without a jury. The Trial Court excluded testimony that the gate was necessary to keep trespassers out, then enjoined Defendants from interfering with Plaintiffs' use of the easement, and permanently enjoined Defendants from maintaining "any gate, locked or unlocked, or any other structure upon said right-of-way which will impede or prohibit the free use thereof." Defendants appealed the evidentiary ruling as well as the Trial Court's order prohibiting them from constructing the gate.

The first appeal resulted in a reported opinion, *Cooper v. Polos*, 898 S.W.2d 237 (Tenn. Ct. App. 1995). In that opinion, this Court set forth the general background of this case, stating:

> The Defendant's property fronts on Tuckaleechee Pike ("the highway") in Blount County. A twenty foot easement runs through, and along the boundary of, the Defendant's property connecting properties located to the rear of his property to the highway. At some time prior to the filing of this suit, the Defendant's neighbor, Shields, with Polos' permission, erected a gate across the right-of-way on the Defendant's property. A driveway over the property of Shields'

[1] Defendant Polos is the sole owner of the servient estate. Defendant Cleveland was sued on the theory that she is Polos' agent. For ease of reference, we refer to the Defendants collectively.

family, whose last name is Teffeteller, runs next to and parallel with the right-of-way at issue in this case. It also connects to the highway. A gate had earlier been installed across the driveway on the Teffeteller property. When Shields installed the gate on the right-of-way over the Defendant's property, he placed it next to his own. The two gates, now side-by-side, were approximately 300 feet back from the highway. Together, they completely blocked the side-by-side ways running along the Teffeteller-Polos property line. After a temporary restraining order was entered in this case, the gate blocking the right-of-way over the Defendant's property was removed pending a resolution of this controversy.

The Plaintiff Norman Cooper testified that he or members of his family had owned their property since 1929, and that the easement over the Defendant's property had been owned by them since 1933. He acknowledged that there were two other gates across the right-of-way at points away from the Defendant's property, but claimed that they did not keep him from using the right-of-way. He further testified that a gate across the right-of-way at the place suggested by the Defendant would not significantly increase security because it would not connect with any existing fencing to the sides of the way. It was his belief that the natural foliage barrier to the right of the proposed gate, which he described as just "a little young growth," would not stop a trespassing vehicle from going around the gate. His wife testified that she has received calls from the Defendant's agent reporting trespassers on the easement, but has never seen any herself.

The first witness for the defense was the Defendant. His counsel sought to question him on the security rationale for the gate, but the trial court sustained an objection to that line of questioning….

* * * *

Mr. Polos' attorney, pursuant to his offer of proof, presented the testimony of Mr. Polos and his neighbors, all of whom testified, outside the presence of the trial judge, that trespassers repeatedly used the easement. One neighbor testified that she had seen both motorcycle traffic and individuals on horseback using the easement without permission. Finally, Mr. Polos called a security expert, who testified that based upon his personal examination of the Polos property, the proposed gate was located in the "correct" location to make the best use of available natural barriers. The security expert

> also testified that even an unlocked gate in that location would serve as a deterrent to trespassers.

Cooper, 898 S.W.2d at 238-39.

In reversing the evidentiary ruling of the Trial Court, this Court relied primarily on the decision of our Supreme Court in *Cole v. Dych*, 535 S.W.2d 315 (Tenn. 1976), where it was argued that the maintenance of a gate by the owner of the property was necessarily inconsistent with the easement. The Supreme Court stated:

> The fact that all owners of the subservient estate maintained gates or other forms of obstructions to prevent unauthorized entry does not alter the character of this roadway. The maintenance of gates is not necessarily inconsistent with the existence of an easement. Generally speaking, the owner of land subject to a right-of-way may maintain gates, if necessary to his use and enjoyment and where such obstructions do not unreasonably interfere with the use of the way.

Cole, 535 S.W.2d at 320.

Relying on *Cole*, this Court in *Cooper* concluded that the Trial Court erred when it excluded the evidence tending to show that the gate was erected for security purposes. Defendant Polos had a right to introduce evidence tending to show the installation and maintenance of a gate was necessary to his "use and enjoyment" and did not "unreasonably interfere" with the use of the easement. *Cooper*, 898 S.W.2d at 242.

When the case was retried, rather than recalling many of the witnesses, the parties agreed to utilize the testimony that had been improperly excluded at the first trial but which had been transcribed for the appeal. Since the first trial occurred in 1994, some of the testimony is dated. Plaintiffs did not testify at the second trial, and for the sake of brevity, we will not restate the accurate summary of their testimony set forth above in the discussion of the *Cooper* opinion in the first appeal.

Plaintiffs' expert witness was Steve Travis ("Travis"), who owns an electronics security company. Travis' deposition was taken on December 7, 2000, and his deposition was offered into evidence. Travis testified part of his job includes inspecting a potential client's property and advising on the best method of security. Travis has inspected the Polos property twice. Travis testified the proposed gate would not attach to a fence on the Teffeteller property because one did not exist, although there apparently had been a fence there at one time.[2] According to Travis, a

[2] This fence apparently was rebuilt just prior to the case being retried. It is for this reason the fence was not in existence when Travis inspected the property, but was in existence when Defendants' expert inspected the property.

person "walking" on the right-of-way could get to the Polos property regardless of whether there was a gate. Travis testified that if a gate were installed, a person desiring to drive past the gate could do so, but they would have to drive over brush and would damage their vehicle. He admitted that a secure gate would "deter a person who didn't want to damage their car to get to the Polos home." Travis further stated that because some of the brush is grown up on the right-of-way, a trespasser would damage their vehicle even if there was no gate. In other words, a trespasser would have to be willing to damage their vehicle regardless of whether the gate was installed. Travis then acknowledged the potential deterrent effect of a gate, stating:

> From the standpoint of keeping a vehicle from getting to the rear of the Polos house, a gate, a locked gate, anyplace along the right-of-way, if a person is unwilling to drive around the gate, it wouldn't matter where on the right-of-way the gate were placed to just stop a vehicle if they were unwilling to drive around it, or break the lock, or whatever.

Polos testified that Defendant Cleveland resides with him. Polos gave Ralph Shields permission to install the gate on the right-of-way because of the presence of unknown vehicles and trespassers. Polos testified he received a telephone call in 1993, from Ms. Teffeteller who informed him that a truck she did not recognize was on the right-of-way, that she did not recognize the occupant, and the person had spent some time on the property. Polos felt there may be trespassing with the intent to "do something illegal on the property." Polos also testified Ralph Shields had farm equipment stolen from a shed in the past. This equipment was physically located on Ms. Teffeteller's property. In 1994, Polos found two teenage boys trespassing on the property. After confronting the trespassers, they quickly left the property. Polos pointed out the gate he proposed to install would attach to a gate on the Teffeteller property and there would be insufficient room for a vehicle to pass between these two gates. There was plant growth on the other side of the proposed gate which Polos believed would prevent a vehicle from circumventing the gate, but if the growth was not sufficient for this purpose, Polos stated he would erect further barriers. The proposed gate would be 200 feet from Polos' house. Typically, he can hear a vehicle traveling on the right-of-way, although he cannot discern if the vehicle is actually on the right-of-way or the main road except when the vehicle is close to his house. The right-of-way parallels two sides of Polos' property. In the summer months when the leaves are on the trees, he has difficulty seeing if someone is on the right-of-way and this increases his security concerns. Polos allowed Ralph Shields to install the gate because he and Cleveland "certainly are concerned about our neighbors, but we also have a concern for our own property and lives." Polos testified he was willing to install an automatic gate which would enable Plaintiffs to open and close the gate without exiting their vehicle.

The next witness was Trent Shields, the grandson of Ms. Teffeteller and the son of Ralph Shields. Trent Shields testified he has observed trespassers on the right-of-way in "summer months, couple times a month." He actually confronted people trespassing on the property. He has seen trespassers on the right-of-way as early as 7:00 a.m. and as late as 11:00 p.m. The number of trespassers typically increases during hunting season and is less in the winter months. In 1985 or

1986, a large irrigation pump weighing over 500 pounds which belonged to his father was stolen from his grandmother's property. He has found empty beer cans, fast food wrappers, and dead squirrels on the property next to the right-of-way.

Joann Shields ("Ms. Shields") also testified. Ms. Shields is the mother of Trent Shields and the daughter of Ms. Teffeteller. Ms. Shields testified to several thefts from her property, including the irrigation pump. The irrigation pump was stored in a shed approximately 20 to 30 feet from the right-of-way. She has observed trespassers on the right-of-way a "couple" of times a month, including people riding horses and people on motorcycles. The roofs on her barn and shed have been "shot full of holes." An old log house on the property was practically destroyed after the antiques stored in it were stolen. Some farm machinery and tools also have been stolen. The barn is located 15 feet from the right-of-way. Ms. Shields testified at the original trial and when the case was retried. At the second trial, she testified she observed trespassers on the property shortly after the first trial. She also has seen cars on the right-of-way every two or three weeks in the very late evening hours. She also observed cars on the right-of-way with no headlights turned on. Ms. Shields stayed with her mother, Ms. Teffeteller, for a while until her mother was moved to a nursing home in 1997. Ms. Teffeteller's bedroom window is about 20 feet from the right-of-way. Ms. Shields could observe the right-of-way from her house as well as her Mother's house.

Cleveland testified she resides with Polos, and when he is out of town on business, she is left alone in the house. Cleveland testified to several telephone calls she received from Ms. Teffeteller informing her there were trespassers on the property. Approximately four or five times within a two year period, Cleveland heard vehicles on the right-of-way but observed no headlights. This alarmed her because someone who was supposed to be on the right-of-way would have had their lights turned on. This has happened on other occasions as well. Cleveland stated reflectors have been stolen from Polos' property.

Defendant called George Fuller ("Fuller") as an expert witness. Fuller has worked twenty years for the BWXT Y-12 National Security Complex in the Center for International Threat Reduction. Fuller inspected the Polos property in 1994 and again just before the case was retried. He testified that a split rail fence had been built on the Teffeteller property and the gate Polos sought to build could "easily" connect to this new fence. Fuller described the fence as "extremely sturdy." Fuller testified that the brush to the right of the proposed gate had grown up to the extent that a vehicle could not drive to the right of the proposed gate in an attempt to get around it. If an intruder did attempt this, there would be sufficient noise to alert Polos or Cleveland. Polos and Cleveland live close enough to the gate to hear it being opened or closed. According to Fuller, the proposed gate would "impede an adversary" and allow Polos or Cleveland time to detect their presence and respond in some way, by "either leaving the house or calling the authorities." Fuller stated that installing the gate in the location suggested by Polos would affect the security of Polos' home and be "prudent." Fuller admitted on cross-examination that an intruder on foot would be able to get onto the Polos property. He also admitted the growth of the brush was high enough on the right-of-way to make it difficult for a vehicle to pass even if the gate is not installed. Fuller went on to explain that the gate would, nevertheless, be useful because it would prevent an intruder from being

able to get out of sight. In any event, Fuller stated that the presence of the gate would act as a deterrent.

During the second trial, the Trial Court excluded some of the testimony of Ms. Shields pertaining to certain illegal activity which had taken place solely on her property. Specifically, Ms. Shields claimed that someone had blown up the chimney in the unoccupied log house on her property and that she had found several dead animals which had been shot on her property.

The Trial Court concluded Defendants failed to prove by a preponderance of the evidence that: (1) the gate was necessary to their use and enjoyment of the land; (2) the gate did not unreasonably interfere with the use and enjoyment of the easement by others entitled to its use; and (3) the gate was erected and maintained for security purposes. Accordingly, the Trial Court permanently enjoined Defendants from interfering with Plaintiffs' use and enjoyment of the easement and from maintaining "any gate, locked or unlocked, or any other structure upon said right of way which will impede or prohibit the free use thereof." Defendants once again appeal, challenging the above listed conclusions of the Trial Court as well as the evidentiary ruling. We reverse and remand.

Discussion

A review of findings of fact by a trial court is *de novo* upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. Rule App. P. 13(d); *Brooks v. Brooks,* 992 S.W.2d 403, 404 (Tenn. 1999). Review of questions of law is *de novo*, without a presumption of correctness. *See Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

While not exactly stated as such by the parties, the question we must resolve is whether or not the preponderance of the evidence weighs against the Trial Court's factual conclusion that installation of the gate is not necessary to Polos' use and enjoyment of his land and that the gate would unreasonably interfere with Plaintiffs' use of the right-of-way. *See Cole*, 535 S.W.2d at 320. The parties quite properly agree that a security concern can affect a person's use and enjoyment of his or her land.

The testimony of the parties and the witnesses shows that for many years, trespassers have utilized the right-of-way over land owned by Polos to gain access to the land off Tuckaleechee Pike. At least some of these trespassers have committed criminal acts, including theft from the Shields, Teffeteller, and Polos properties, as well as shooting holes in various structures. Individuals have been observed early in the morning and late at night loitering at various locations on the right-of-way, sometimes at night with no head lights turned on. Empty beer cans and fast food wrappers have been found on or near the right-of-way. At least some of the trespassers are armed. Understandably, this is disturbing to any of the residents regardless of whether they are male or female. The gate Polos proposes to install would prevent vehicle access to his property which lies

beyond the gate, as well as the vast majority of the land owned by Polos' neighbors which has been subject to trespassers and vandals.

On appeal, Plaintiffs argue that the real purpose for the gate is to provide the Shields, not Polos, with security. Plaintiffs claim the security of the Shields cannot affect whether the gate is necessary for *Polos'* use and enjoyment of *his* land. We disagree with this position because the unlawful acts occurring on the Shields' property accessed by the right-of-way are legitimate and relevant factors considered by Polos as to the security of his home and land. In our opinion, the significance of the trespassing coupled with the conduct engaged in by the trespassers is of such a degree that it would interfere with Polos' use and enjoyment of his land. It is of equal importance that Polos owns the land over which the right-of-way runs and much of the disturbing conduct is, therefore, actually occurring on *his* land.

This case does not involve simply a battle of the experts and a credibility determination. Both experts agree that a gate will provide a deterrent effect to trespassers in vehicles. Plaintiffs' expert claimed the gate would not be effective because there was no fence to attach the gate to, but this testimony is of no avail given the fact that the fence on the Teffeteller property was in the process of being rebuilt and when finished was described as "extremely sturdy." The question is not whether the proposed gate will be 100% effective in keeping trespassers out. The question is whether the gate is necessary to Polos' use and enjoyment of his land and, if so, whether its installation would interfere unreasonably with Plaintiffs' use of the right-of-way.

We conclude the preponderance of the evidence weighs against the Trial Court's factual conclusion that installation of the gate was not necessary to Polos' use and enjoyment of his land. Having made this determination, the only remaining issue is whether the gate would *unreasonably* interfere with Plaintiffs' use of the right-of-way. *Cole*, 535 S.W.2d at 320. As set forth previously, Polos testified he was willing to install an electronic gate so Plaintiffs would not have to exit their vehicle to open or close the gate. In light of this testimony and the entire record, we find that a gate can be installed in such a manner so as not to interfere unreasonably with Plaintiffs' use of the right-of-way. Therefore, we remand this case to the Trial Court for a hearing to determine the best way for the gate to be installed and maintained so as to interfere least with Plaintiffs' use of the right-of-way.

Conclusion

The judgment of the Trial Court is reversed, and this cause is remanded to the Trial Court for further proceedings as required, consistent with this Opinion, and for collection of the costs below. The costs on appeal are assessed against the Appellees, Norman and Ina Cooper.

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D. MICHAEL SWINEY, JUDGE