

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

**FILED**  
August 20, 1996  
Cecil Crowson, Jr.  
Appellate Court Clerk

ESTATE OF WALTER BATES, ) C/ A NO. 03A01-9604-CH-00140  
Candy Green, Personal )  
Representative, )  
 ) POLK CHANCERY  
 )  
Plaintiff-Appellee, )  
 ) HON. EARL H. HENLEY,  
 ) CHANCELLOR  
v. )  
 )  
 )  
EARL WILLIAMS and wife, )  
GAIL WILLIAMS, )  
 ) AFFIRMED  
 ) AND  
Defendants-Appellants. ) REMANDED

B. PRINCE MILLER, JR., Cleveland, for Plaintiff-Appellee.  
JOE G. BAGWELL, Knoxville, for Defendants-Appellants.

O P I N I O N

Franks. J.

This dispute arose over the use of a roadway separating the parties' properties. The Chancellor determined that defendants had reconstructed the roadway and rendered impassable the remaining portion of the old roadway. The Chancellor was of the opinion that there is a common easement between the parties and concluded:

since the defendants have made the improvements, it is not only fair but pertinent that the plaintiffs have the right of ingress and egress over the road, but they will be required to contribute \$1,500.00 to

the defendants for the work the latter people did in making such repairs. The plaintiffs shall continue to share their part of the maintenance expense over the part of the road used by them

On appeal, defendants insist the evidence does not support the findings by the Chancellor. The findings come to us with a presumption of correctness, unless the evidence preponderates against the findings by the Trial Judge.

T. R. A. P. Rule 13(d).

In reviewing the evidence *de novo* we find that the disputed original roadway was one-half on each of the parties' land, with the boundary line essentially being the center of the roadway. The evidence also establishes that the road had been used by the owners and others long in excess of twenty years.

Defendants elected to build or reconstruct the roadway, and while there is no survey in the record establishing the exact boundary between the parties, the evidence establishes that the main traveled portion of the reconstructed roadway is essentially on defendants' land, but substantially includes the portion of the old roadway which was on defendants' land. The evidence also establishes that fill dirt has spilled onto plaintiff's half of the old roadway, and drainage ditches and pipes encroach on the remainder of the old road bed. The Chancellor found that the new construction now renders the lower section of the roadway impassable?. One of the plaintiff's witnesses testified, without objection, as follows:

Q. And except for putting in culverts to cross the creek, you can build a road on your property just as the Williams' did to accomplish the same purpose that you've just described; is

that correct?

- A. I suppose that could be done with a great amount of expense. But we had access to half, by the property line, of the old road bed which has now been destroyed by their actions.

The Trial Judge is in the best position to judge the credibility of the witnesses, and the evidence does not preponderate against his finding on this issue. T. R. A. P. Rule 13(d).

Next, defendants insist that plaintiffs did not establish an easement to use the old roadway, because they did not demonstrate that their use of the original roadway was adverse. We cannot agree. We held in *Knight v. Utz*, 673 S.W2d 161 (Tenn. App. 1984) that mutual use by adjacent property owners of a roadway separating the properties and lying partially on each property, would be adverse to the separate or exclusive use by either. Accordingly, we conclude that plaintiffs established a right to use the original roadway.

The fact that the construction of the new roadway prevents the use of the old roadway and the further fact that the new roadway lies in part on the easement on defendants' side of the property line, establishes an adequate basis for the relief fashioned by the Chancellor. We find the remaining issues to be without merit, and affirm the judgment of the Chancellor.

The cost of appeal is assessed to appellants.

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Herschel P. Franks, J.

CONCUR:

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Houston M Goddard, P. J.

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Charles D. Susano, Jr., J.