

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

**FILED**  
**July 30, 1996**  
**Cecil Crowson, Jr.**  
Appellate Court Clerk

SHELCO CORPORATION,  
  
Appellee/Complainant/  
Counter-Defendant,

v.

RANDALL BARKER and CARLENA  
L. BARKER,  
  
Appellants/Defendants/  
Counter-Plaintiffs and  
Third-Party Plaintiffs,

v.

CAMPBELL COUNTY ROAD  
DEPARTMENT by its Road  
Supervisor, J. T. LEACH and  
ARNSTON SHARP,

Third Party Defendant/  
Appellee.

C/ A NO. 03A01-9509-CH-00317

CAMPBELL CHANCERY

HON. BILLY JOE WHITE,  
CHANCELLOR

AFFIRMED  
AND  
REMANDED

FRANK DOSSETT, LaFollette, for Appellee/Complainant/Counter-Defendant.

KENNETH R. KRUSHENSKI, LaFollette, for Appellants/Defendants/Counter-Plaintiffs and Third-Party Plaintiffs.

O P I N I O N

Franks. J.

This action was precipitated when defendants blocked plaintiff's means of ingress and egress to their property across defendants' land. The issue for the Trial Court was whether the roadway was a public road, and the Trial Judge granted plaintiff's summary judgment, stating:

The right-of-way in question is a public road and there is no evidence of an intent to abandon the same by Campbell County, Tennessee, and there is no controversy of material facts in the record.

Defendants appealed, insisting there are disputed issues of material facts. Essentially, they argue there is evidence that the road had lost its character as a public road, due to non-use by the general public and neglect by the County. Defendant filed a third-party pleading against "Campbell County Road Department by its Road Supervisor J.T. Leach and Arnston Sharp" in this action, and then requested admissions from the Road Supervisor. Essentially, the Road Supervisor admitted that he had been Road Supervisor in Campbell County since September 1, 1980, and admitted that the road did not "appear on any list of roads which is kept by this third-party defendant". Further, that the road department had not "worked" the road since September 1, 1980.

It is undisputed that defendants acquired their property in 1983, and their deed from the grantor, along with an accompanying plat, show the road leading across plaintiffs'

property. Campbell County Quarterly Court in 1951 voted to acquire the right-of-way to this road, and a right-of-way was purchased pursuant to the resolution. The record also established that there was some use of the road by the general public until defendants placed a cable across the road to prevent its use, giving rise to this action. In August of 1993, defendant appeared before the County Commission, requesting that a quit-claim deed be made to him for the road right-of-way. The Commission appointed a committee to consider the request, and the Commission acted on October 16, 1993, unanimously saying:

...that the road in question remain as is, since the Court does not favorably consider the request for the quit claim deed.

Plaintiff in his deposition testified he had lived on the property since 1985, and acknowledged "a few people" have used the road. He further stated that he had "asked them [Road Commissioner] for years to do something with the damn thing". We conclude there is not a disputed issue of material fact requiring a remand for trial. *See Byrd v. Hall*, 847 S.W2d 208 (Tenn. 1993).

It is clear that there may be an abandonment of a public road, but the burden is on the parties asserting the abandonment to establish the intention to abandon, and an abandonment may be shown by evidence *in pas* as well as by public record. *See Hargis v. Collier*, 578 S.W2d 953 (Tenn. App. 1978). This Court said in *Farr v. Pentecost*, 1994 WL 12617 (Tenn. App.):

Tennessee courts have held that evidence of mere non-use alone does not establish abandonment, *Jacoway v. Palmer*, 753 S.W2d 675, 677-78 (Tenn. App. 1987), nor will a city or county's failure to maintain a public road when it is being used by the public. *Cartwright v. Bell*, 418 S.W2d 463, 469-70 (Tenn. App. 1967). There must be a positive showing of an intent to abandon (*Jacoway*).

Plaintiffs' efforts to secure the vacation of the roadway constitutes an admission that the road has never been abandoned. See 39(a) *CJS Highways*, Section 130, p.847-8.

Defendants purchased their property by deed showing the road, sought vacation by the county of the road in 1993, and admitted some continuing use of the roadway until they blocked the road. This is not in dispute, and establishes the road has not been abandoned, as determined by the Trial Judge.

We affirm the judgment of the Trial Court and remand at appellants' cost.

-----  
Herschel P. Franks, J.

CONCUR:

-----  
Don T. McMurray, J.

---

Charles D. Susano, Jr., J.