IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 16, 2023 Session

PHILIP HYER v. JUANITA MILLER

Appeal from the Circuit Court for Carter County
No. C8371 Jean A. Stanley, Judge

No. E2022-00640-COA-R3-CV

After flooding washed away a bridge and part of a driveway which a homeowner used to access his house, he made repairs. The repaired route was also used on rare occasions by an easement holder who had a right to access a family cemetery. The homeowner brought suit against the easement holder, seeking equitable reimbursement for the costs of repairs. The trial court ruled against the homeowner, concluding the equities of this case did not warrant requiring the easement holder to contribute to the costs of repair. The homeowner appealed. We conclude that the trial court did not abuse its discretion; accordingly, we affirm the trial court's ruling.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JEFFREY USMAN, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J. and THOMAS R. FRIERSON, II, J., joined.

John S. Taylor, Jonesborough, Tennessee, for the appellant, Philip Hyer.[1]

OPINION

I.

Mr. Philip Hyer purchased a large tract of property in Carter County, Tennessee, in 2001. A family cemetery, which was established in the early 1900s, was already on the property. More than 20 members of Ms. Juanita Miller's extended family have been buried there, with the last family member buried in 1988. Ms. Miller drove across Mr. Hyer's property, as she and her father had when the property was owned by Mr. Hyer's predecessor, to visit and maintain a family cemetery. Ms. Miller asserted that after purchasing the property, Mr. Hyer denied her access. Litigation ensued between Ms. Miller

[1] Juanita Miller did not file a responsive brief or participate in oral argument.

and Mr. Hyer in Carter County Circuit Court. This would not be last time these parties would be embroiled in litigation.

In this initial round of litigation, the Carter County Circuit Court concluded that Ms. Miller had a right to access and to maintain her family cemetery. The court granted Ms. Miller an easement "over and along the traditional route followed." Mr. Hyer's property and the family cemetery are located in the mountains in east Tennessee. Bear Branch Creek runs along one edge of Mr. Hyer's property, separating the bulk of Mr. Hyer's property from the road. Entering onto Mr. Hyer's property from a public roadway, the traditional route to the cemetery included traversing a bridge over Bear Branch Creek and traveling along the driveway before veering off across unimproved land to the family cemetery. At least before veering off the driveway for the cemetery, this meant Ms. Miller's easement to her family cemetery made use of exactly the same route that Mr. Hyer used daily in accessing his home. At some point in the litigation, the parties considered other paths for Ms. Miller to use as an easement to access the property; however, due to the topography and the condition of the land, the easement ultimately remained along the same traditional route.

Recurring issues would arise in connection with this easement and route. In subsequent years, more than once, a Carter County trial court found Mr. Hyer to have engaged in actions that constituted contempt by blocking Ms. Miller's route. Another recurring issue that arose involved the flooding of Bear Branch Creek. Heavy rains would cause the creek to flood, which in turn damaged Mr. Hyer's partially graveled driveway and bridge. For a number of years, the county road department assisted with flood mitigation efforts. In 2019 and 2020, Mr. Hyer experienced severe flooding that washed out his bridge and portions of his driveway. By this point, the county was no longer assisting. Mr. Hyer contacted Ms. Miller regarding reconstruction of the bridge and driveway. Ms. Miller rejected Mr. Hyer's request for her participation in the process.

Mr. Hyer hired "We Do It Right" to repair the driveway and bridge and to prevent future recurrences. He paid $46,426.43. Mr. Hyer brought suit seeking, among other things, compensation for an equitable share of these repair costs.

After a trial on the merits, the trial court determined that Mr. Hyer did not make the repairs for the benefit of Ms. Miller but for his own benefit and granted judgment to Ms. Miller, concluding that she owed nothing. In its order granting judgment to Ms. Miller, the court stated the following:

> The Court finds that Mr. Hyer has recently completed substantial repairs to a portion of his existing driveway to repair damage that was caused by years of storm water runoff. It appears that a good job was done on the repairs although some of the expenses incurred could be considered excessive.

> Although these repairs may have been necessary to allow access to his property by vehicle, the Court finds that Mr. Hyer did not make the repairs for the benefit of Ms. Miller. Instead he made the repairs for his own benefit. He fixed his driveway by which he accesses his residence daily.
>
> Ms. Miller has a right-of-way which partially crosses over the repaired portion of Mr. Hyer's driveway from Browns Branch Road so that she may access the Stevens Family Cemetery. Her use of the right-of-way has been very infrequent.
>
> After reviewing the case law submitted by counsel, the Court finds that Mr. Hyer does not have a duty to maintain the right-of-way they mutually use for Ms. Miller's use, and in fact he could entirely abandon the right-of-way if he chose to do so which would require her to maintain the same if she desired to use it. Mr. Hyer's only legal obligation is not to block or impede the access to the cemetery granted to Ms. Miller. He chose to undertake significant repairs of a portion of the right-of-way which coincides with his driveway. There were no costs incurred or repairs made to the portion of the right-of-way that would be used solely by Ms. Miller to access the cemetery. Mr. Hyer chose to make the repairs to his driveway for his own benefit to access his property and he cannot pass the cost for those repairs on to Ms. Miller.

The parties proceeded without transcription of the testimony presented in this case and instead rely upon a statement of the evidence pursuant to Rule 24 of the Tennessee Rules of Appellate Procedure. Therein, the trial court rejected the portion of Mr. Hyer's proposed statement of the evidence that asserted he had been required, sometimes under threats of contempt, to keep the portion of the driveway and bridge that Ms. Miller traversed to reach the cemetery "in good working order." The trial court instead indicated that Ms. Miller had "insisted that Mr. Hyer not block or impede her access to the cemetery," but that "Ms. Miller never insisted upon or even suggested any specific repairs or improvements." The Rule 24 Statement also noted that Ms. Miller was eighty-two years old at the time of the decision in this case, that she still drives, but she has not accessed the cemetery even once since the repairs were completed.

Mr. Hyer timely appealed. He argues the trial court erred by failing to order Ms. Miller to pay an equitable portion of the repair costs. This result follows, according to Mr. Hyer, because as the easement holder she has a duty to maintain the easement while the owner of the servient estate is under no such obligation. Mr. Hyer does not argue, however, that the costs should entirely fall upon Ms. Miller. Rather, he contends that the parties should each pay an equitable share, which he asserts would be an equal split of the costs of repair in the present case.

Asserting that various rounds of litigation with Mr. Hyer over the course of twenty years have left her unable to afford counsel on appeal, Ms. Miller filed a notice stating that she would not be filing a brief. Therefore, this case was submitted to this court on the appellant's brief and the record.

II.

Under Tennessee Rule of Appellate Procedure 13(d), "[u]nless otherwise required by statute," Tennessee appellate courts' "review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." We review the trial court's conclusions on questions of law de novo with no presumption of correctness. *See*, *e.g.*, *Trent v. Mountain Com. Bank*, 606 S.W.3d 258, 262 (Tenn. 2020); *Kelly v. Kelly*, 445 S.W.3d 685, 692 (Tenn. 2014). We review a trial court's decision weighing equities in resolving a question subject to equitable determination under an abuse of discretion standard. *See*, *e.g.*, *Buckley v. Carlock*, 652 S.W.3d 432, 443–44 (Tenn. Ct. App. 2022); *Hixson v. Am. Towers, LLC*, 593 S.W.3d 699, 718 (Tenn. Ct. App. 2019). Appellate courts will set aside a discretionary decision by a trial court "only when the court that made the decision applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party." *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008). "If a discretionary decision is within a range of acceptable alternatives," a Tennessee appellate court "will not substitute our judgment for that of the trial court simply because we may have chosen a different alternative." *Royal Properties, Inc. v. City of Knoxville*, 490 S.W.3d 1, 7 (Tenn. Ct. App. 2015); *Riad v. Erie Ins. Exch.*, 436 S.W.3d 256, 266 (Tenn. Ct. App. 2013).

III.

Mr. Hyer's argument on appeal is correct insofar as, in the absence of agreement to the contrary, the general rule is that an easement holder has both a right and duty to maintain the easement,[2] and the servient estate owner has no obligation to maintain the

[2] Regarding the rights and duties of an easement holder, this court has observed that:

> Absent an agreement to the contrary, an easement holder "has both a right and the duty to maintain an easement so that it can be used for its granted purpose[.]" 28A C.J.S. Easements § 227; *see also* 25 Am. Jur. 2d Easements and Licenses § 72. "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. . . ." *Hager v. George*, No. M2013-02049-COA-R3-CV, 2014 WL 3371680, at *5 (Tenn. Ct. App., filed July 8, 2014) (quoting 28A C.J.S. Easements § 227).

Hixson, 593 S.W.3d at 710.

easement, but instead is obligated only to avoid interfering with its usage.[3] The circumstances of the present case, however, add a layer of complexity. Much of the route over which Ms. Miller's easement proceeds, and the entirety of the repaired improvements at issue in this appeal, is not used solely for her benefit. Rather, it is used for the joint benefit of the easement holder and the owner of the servient estate with the servient estate owner being by far the primary beneficiary of this jointly utilized means of access.

Under Restatement (Third) of Property (Servitudes) § 4.13 (2000), in the absence of agreement to the contrary, where there is joint usage, this "gives rise to an obligation to contribute jointly to the costs reasonably incurred for repair and maintenance of the portion of the servient estate or improvements used in common." The Restatement further notes:

> When the owner of the servient estate and the beneficiary of an easement . . . both make use of the servient estate . . ., they are both liable to contribute to the costs reasonably incurred for repair and maintenance of the portion of the servient estate and the improvements they use in common.

Id. at Restatement (Third) of Property (Servitudes) § 4.13 cmt. d. The Restatement suggests a variety of factors to consider in allocating repair and maintenance costs including, among others, "the frequency and intensity of use made by each." *Id.*

Writing nearly three decades ago, the Missouri Court of Appeals observed that:

> A respectable body of authority in other jurisdictions holds that apportionment of the cost of repairs and maintenance of a private roadway between the owners of the dominant and servient tenements is fair and just, even though the agreement creating the easement is silent with respect thereto, where the owners of both the dominant and servient tenements regularly use the private roadway.

McDonald v. Bemboom, 694 S.W.2d 782, 786 (Mo. Ct. App. 1985). The New Hampshire Supreme Court observed that "[t]his rule is based upon the principle that, by using the easement, both the dominant and servient estates contribute to its wear and deterioration and, therefore, distribution of the burden of easement maintenance and repair between both

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[3] In relation to the responsibilities of the servient estate owner in the absence of an agreement to the contrary, this court has observed that:

> [t]he owner of a servient estate generally has no duty to maintain or repair an easement for the benefit of the dominant tenant in the absence of an agreement requiring it." 28A C.J.S. Easements § 227; *see also* 25 Am. Jur. 2d Easements and Licenses § 72. Instead, the owner of the servient estate must simply "abstain from acts that are inconsistent with the easement." 28A C.J.S. Easements § 191.

Hixson, 593 S.W.3d at 710.

estates is equitable and just." *Vill. Green Condo. Ass'n v. Hodges*, 114 A.3d 323, 328–29 (2015); *see also Beneduci v. Valadares*, 812 A.2d 41, 51 (Conn. Ct. App. 2002) ("It is appropriate that both parties contribute to the maintenance of the driveway because both parties contribute to the wear on the driveway.").

In joint usage cases, in the absence of an agreement addressing the allocation of repair and maintenance costs, there is a broadly accepted common law view that appropriate allocation is a matter for equitable determination. *See*, *e.g.*, *Gold Coast Neighborhood Ass'n v. State*, 403 P.3d 214, 237 (Haw. 2017) (allocation is "in accordance with equitable considerations"); *Baker v. Hines*, 406 S.W.3d 21, 30 (Ky. Ct. App. 2013) (concluding that "where an easement is jointly used by the dominant and servient estates, the cost to maintain the easement should be equitably divided between the two estates"). Courts have offered a variety of formulations for how this equitable determination should be made. In allocating costs, the Illinois Court of Appeals noted a requirement of the repairing party, whether servient estate owner or easement holder, to provide adequate notice and an opportunity to participate in the decisions regarding repairs to the other party. *Quinlan v. Stouffe*, 823 N.E.2d 597, 606 (Ill. Ct. App. 2005). The Illinois Court of Appeals also emphasized the importance of the reasonableness of repairs and maintenance being performed as well as whether the repair was actually performed adequately, properly, and at a reasonable cost. *Id*. Multiple states have tied equitable allocation to approximating the parties' relative level of usage. Jon W. Bruce and James W. Ely, Jr., *The Law of Easements & Licenses in Land* § 8:37 (2023) (noting for state courts "[a]pportionment is commonly based on the relative extent of usage"); *see also*, *e.g.*, *Bina v. Bina*, 239 N.W. 68, 71 (Iowa 1931) ("It appears from the record that the appellant does not use the private road so much as does the appellee . . . . Appellant, therefore, should bear a correspondingly lower proportion of the repair burden than that imposed upon the appellee"); *Lindhorst v. Wright*, 616 P.2d 450, 454–55 (Okla. Civ. App. 1980) (stating "the costs of repair and maintenance should be distributed among all users in proportions that closely approximate the usage of the parties"); *Oak Lane Homeowners Ass'n v. Griffin*, 255 P.3d 677, 682 (Utah 2011) (citation omitted) (indicating that "the default rule in Utah for the maintenance of private roadways is that, '[a]bsent any agreement on the question of maintenance of a private way, the burden of upkeep should be distributed between dominant and servient tenements in proportion to their relative use of the road, as nearly as such may be ascertained'"). The Hawaii Supreme Court agreed that equitable considerations should include "relative use" but also added enjoyment and contributions when determining equitable allocation of costs of repair and maintenance. *Gold Coast*, 403 P.3d at 237. The Arizona Court of Appeals determined that allocation should be based on:

> an equitable apportionment determined after consideration of various relevant factors, which may include but are not limited to each party's proportionate use of the easement, including the amount and intensity of actual use, and the benefits derived therefrom; whether each party received proper notice and a reasonable opportunity to participate in the decisions

> regarding repairs and maintenance; whether the completed work was reasonable and necessary; whether the repairs and maintenance were performed adequately, properly, and at a reasonable price; the value of any other contributions (monetary or in kind) by the parties to repairs and maintenance; and any other factors that may be deemed relevant.

Freeman v. Sorchych, 245 P.3d 927, 935–36 (Ariz. Ct. App. 2011). The Wyoming Supreme Court similarly offered a number of considerations when equitably apportioning the costs of repairing and maintaining a road among easement holders. *Koch v. J & J Ranch, LLC*, 299 P.3d 689, 694 (Wyo. 2013).

> Those circumstances include but are not limited to: (1) the amount and intensity of each party's actual use of the road and the benefits they derive from that use; (2) whether a party had notice of and an opportunity to participate in repair and maintenance decisions; (3) whether the work consisted of reasonable and necessary repairs and maintenance, rather than improvements to the road; (4) whether the quality and price of the work was reasonable; and (5) the value of other monetary or in-kind contributions to repair and maintenance made by the parties.

Id. (citing *Rageth v. Sidon Irr. Dist.*, 258 P.3d 712, 719–20 (Wyo. 2011)).

Given the paucity of briefing in this case on the appropriate considerations in joint usage cases and the lack of need to settle upon a particular formulation to resolve the present case, we exercise judicial restraint and will await a more appropriate case to attempt to define with more precise contour the most appropriate factors for analyzing allocation cases of this type. If we were to consider the matter anew, we may not have reached the same allocation decision as the trial court, and we anticipate that only in rare cases will no contribution from one of the parties be considered an appropriate equitable allocation.

Nevertheless, the equities of the present case support the determination that the trial court did not abuse its discretion. Mr. Hyer uses the repaired bridge and driveway to access his home. It is the only reasonable route to access his home, and he uses the route frequently. As a practical matter, regardless of whether Ms. Miller had an easement, Mr. Hyer would have needed to repair this route, and the trial court concluded this was, in fact, the only reason he repaired the bridge and driveway. Mr. Hyer spent an amount of money on the repairs that the trial court concluded was, at least in some respects, excessive. Ms. Miller alternatively uses the easement not to access a home, a business, a recreational retreat, etc., but instead to access a family cemetery. She only rarely uses this route and apparently since the repairs not at all. She has, nevertheless, on more than one occasion had to litigate to enforce her right of access against actions deemed by the Carter County Circuit Court to rise to the level of constituting contempt by Mr. Hyer in affirmatively acting to block her access. The last occasion prompted the trial court to caution Mr. Hyer that further transgressions could result in a finding of criminal contempt and a jail sentence

of ten days per offense. There is no indication that Ms. Miller's limited usage imposed any meaningful wear and tear on the access route. She did not ask for or seek any repairs of the damaged route. Even under these circumstances, it is far from obvious that no contribution, including even a nominal contribution, to the repair cost should be expected from Ms. Miller, but we cannot conclude that the trial court abused its discretion in reaching its decision.

IV.

Based upon the foregoing, we affirm the judgment of the trial court. Costs of this appeal are taxed to the Appellant, Philip Hyer, for which execution shall issue if necessary.

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JEFFREY USMAN, JUDGE