IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 13, 2014 Session

ARTHUR B. ROBERTS ET AL. v. ROBERT BAILEY ET AL.

Appeal from the Chancery Court for Loudon County
No. 11419 Frank V. Williams, III, Chancellor

No. E2013-01950-COA-R3-CV-FILED-JULY 31, 2014

This is the second appeal to this Court involving the instant real property dispute. At issue is a 58-acre portion ("Disputed Property") of what was an approximately 100-acre tract acquired by N.B. Bailey and his wife, Pearl Bailey, by warranty deed in 1918. The original plaintiffs, Arthur B. and Tia Roberts,[1] were neighboring landowners who brought a boundary dispute action in March 2009 against the original defendants, Robert W. Bailey, Richard Neal Bailey, and Lisa Bailey Dishner ("the Baileys"). During the course of the boundary dispute, N.B. and Pearl Bailey's descendants and successors in title became aware that their ownership interest in the Disputed Property could be affected by the possibility that N.B. and Pearl Bailey owned the original 100 acres as tenants in common rather than tenants by the entirety. The first appeal arose when the Baileys, proceeding as third-party plaintiffs, filed a motion to quiet title to the Disputed Property against the third-party defendants, Dale Littleton, Alice Littleton, Kimber Littleton, Mark Lee Littleton, and Charlotte Dutton ("The Littletons and Ms. Dutton"). On March 30, 2010, the trial court granted partial summary judgment in favor of the Littletons and Ms. Dutton, and the court certified its order as a final judgment pursuant to Tennessee Rule of Civil Procedure 54.02. On appeal, this Court questioned the finality of that March 2010 order but allowed the appeal to proceed on an interlocutory basis. *Roberts v. Bailey*, 338 S.W.3d 540, 541 n.1 (Tenn. Ct. App. 2010), *perm. denied* (Tenn. Mar. 9, 2011) ("*Roberts I*"). This Court affirmed the trial court's ruling and held that because N.B. and Pearl Bailey acquired title during the "gap years" between the emancipation of women and enactment of the Bejach statutes reestablishing tenancies by the entirety–spanning January 1, 1914, through April 16, 1919–N.B. and Pearl Bailey owned the real property as tenants in common rather than as tenants by the entireties. *Id.* at 541. On remand, the Baileys moved to amend their third-party complaint, averring that despite the affirmed judgment in favor of the Littletons' and Ms. Dutton's ownership interest in the Disputed Property, the Baileys nonetheless possessed absolute fee simple title by prescription

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[1]The Robertses are not parties to this appeal.

to the entire Disputed Property. The trial court granted the Baileys' motion to amend the complaint and subsequently considered competing motions for summary judgment. The trial court found, *inter alia*, that the Baileys failed to establish title by prescription because the Littletons and Ms. Dutton had no knowledge of their co-tenancy prior to initiation of this action. The court granted summary judgment to the Littletons and Ms. Dutton, quieting title to the Disputed Property among the parties. The Baileys appeal. Discerning no reversible error, we affirm.

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

THOMAS R. FRIERSON, II, J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., C.J., and JOHN W. MCCLARTY, J., joined.

Matthew A. Grossman, Knoxville, Tennessee, for the appellants, Richard Neal Bailey and Lisa Bailey Dishner.

Thomas M. Hale and Adam G. Russell, Knoxville, Tennessee, for the appellees, Dale Littleton, Kimber Littleton, and Mark Lee Littleton.[2]

OPINION

I. Factual and Procedural Background

The essential facts relevant to this action are undisputed. In *Roberts I*, this Court summarized the pertinent derivation of title to the Disputed Property as follows:

> In October of 1918, C.B. Bowling and his wife conveyed to N.B. Bailey and his wife, Pearl Bailey, a tract of real property consisting of around 100 acres. N.B. Bailey died in 1948 seized of the real property at issue in this case and leaving his wife, Pearl Bailey, and four children.

Roberts I, 338 S.W.3d at 541.

N.B. Bailey died intestate. Although it is clear from the record that following her husband's death, Pearl Bailey believed she owned the entire 100 acres in fee simple, she

[2]During the pendency of this appeal, Ms. Dutton, acting through counsel, filed notice with this Court that she did not wish to participate and would allow her rights and obligations as to the Disputed Property to be decided on appeal without her participation.

actually only owned and was only able to convey a 50% interest as a surviving tenant in common. *See id.* (explaining that title acquired by husband and wife during the "gap years" of January 1, 1914 through April 16, 1919, does not constitute a tenancy by the entireties) (citing the relevant holding of *Gill v. McKinney*, 205 S.W. 416, 418 (Tenn. 1918), as the prevailing law). Furthermore, under the Tennessee rules of intestate succession of real property in force at the time of N.B. Bailey's death, his 50% fee simple interest in the real property passed in equal shares to his four children with no portion of that 50% interest passing to his widow. *See* 166 Albert W. Secor, *Tennessee Practice: Tennessee Probate* § 16:10 (3d ed. 2013) (explaining that prior to enactment effective April 1, 1977, of the current statute governing descent and distribution,[3] Tennessee Code Annotated § 31-101(1)(a) of the 1955 Code provided that "[t]he land of an intestate owner shall be inherited . . . [b]y all the sons and daughters of the deceased, to be divided among them equally" and that this section was "virtually identical" to § 8380 of the 1932 Code and its predecessors); *see, e.g., Preston v. Smith*, 293 S.W.2d 51, 61 (Tenn. Ct. App. 1955), *affirmed and suggested for publication* (Tenn. 1956) (holding that a husband and wife acquired land through adverse possession as tenants in common with the result being that their separate heirs were each, respectively, the owners of a one-half divided interest in the land).[4]

N.B. and Pearl Bailey's four children were Robert W. Bailey, Naomi Bailey Littleton, Thelma Bailey Patty, and Pauline Bailey Whitaker. Following N.B. Bailey's death in 1948, the relevant conveyances and other events in the chain of title to the Disputed Property occurred as follows:

July 12, 1957:	Pearl Bailey conveyed via warranty deed all of her interest in the 58-acre Disputed Property to Robert W. Bailey, and his wife, Fay Bailey. This deed was recorded on November 3, 1959.
November 21, 1959:	Robert W. and Fay Bailey, with Pearl Bailey, conveyed their interest in a small parcel of the Disputed Property ("Small Parcel"), slightly more than one-quarter acre in

[3]The comparable section governing descent and distribution in force since April 1, 1977, is Tennessee Code Annotated § 31-2-104(a) (2007) (eliminating the previous distinction between real property and personal property, and providing that when an intestate decedent is survived by both issue and a spouse, the surviving spouse inherits either one-third of the decedent's estate or a child's share, whichever is greater). *See* 1976 Pub. Acts, ch. 538, § 1.

[4]Enactment of the 1977 statute operated to abolish dower and curtesy, which had entitled a surviving spouse, wife or husband respectively, to a partial life estate in a deceased spouse's real property. *See* 165 Secor at § 16:8.

	size, via warranty deed to Thelma Bailey Patty and her husband, Ned Patty, Jr. This deed was recorded on November 30, 1959.
Prior to Feb. 7, 1977:	Pauline Bailey Whitaker died intestate with no living children.
February 4,[5] 1977:	Pearl Bailey conveyed her interest in the remaining property (42.9 acres) via warranty deed in equal thirds to her three living children: Robert W. Bailey, Naomi Bailey Littleton, and Thelma Bailey Patty. This deed was recorded on February 10, 1977.
September 1983:	Fay Bailey (wife of Robert) conveyed via quitclaim deed her interest in the Disputed Property to the "Bailey Children," Richard Neal Bailey and Lisa Bailey Dishner. This deed was recorded on January 5, 1993.
November 1983:	Pearl Bailey died, having conveyed all of her interest in the Disputed Property prior to her death.
September 22, 1990:	Naomi Bailey Littleton conveyed her interest in the original 100 acres, excepting the 58-acre Disputed Property, to Robert W. Bailey via quitclaim deed. This deed was recorded on June 4, 1991.
October 8, 1990:	Naomi Bailey Littleton died intestate and left as heirs one living son, Dale Littleton, and two grandchildren, Mark Lee Littleton and Kimber Littleton, who had been born to Wayne Littleton, a son who predeceased Naomi Bailey Littleton.
August 3, 1991:	While retaining a life estate, Robert W. Bailey conveyed the remainder of his interest in the entire 100 acres via quitclaim deed to his children, Richard Neal Bailey and

[5]In their brief on appeal, the Baileys list the date of this conveyance as February 7, 1977, and that portion of the factual summary is incorporated by the Littletons into their brief. The copy of this conveyance presented in the record, however, indicates the date as February 4, 1977. The difference in dates has no substantive impact on the issues presented.

	Lisa Bailey Dishner. This deed was recorded on August 8, 1991.
November 1, 2001:	Thelma Bailey Patty, having survived Ned Patty, Jr., died testate, leaving her interest in "any and all" real property to her daughter, Charlotte Patty Dutton.
February 1, 2013:	Robert W. Bailey died during the pendency of this action, thereby terminating his life estate in the Disputed Property.

Following this Court's 2010 decision in *Roberts I* and our Supreme Court's subsequent denial of the Baileys' Tennessee Rule of Appellate Procedure 11 application, this case was remanded to the trial court for further proceedings. On November 29, 2011, the Littletons and Ms. Dutton filed a motion for declaratory judgment, delineating their determination of the parties' relative percentage ownership interests in the Disputed Property and requesting an order establishing those interests. The Baileys filed a response a few days later on December 5, 2011, stating that they were pursuing a "legislative solution" to the ownership status of their property. On February 15, 2012, Richard Neal Bailey, acting through separate and individual counsel, filed a Tennessee Rule of Civil Procedure 15 motion to amend the third-party complaint to include relief sought under the doctrine of title by prescription. He was subsequently joined by Robert W. Bailey and Lisa Bailey Dishner in this request on February 29, 2012. Following a hearing conducted on March 16, 2012, the trial court entered an order, *inter alia*, granting the Baileys' motions to amend their third-party complaint and bifurcating the boundary dispute with the Robertses from the instant action.

On January 24, 2013, the Baileys, again proceeding together, filed a motion for summary judgment, asserting the doctrines of title by prescription and estoppel by deed. The Baileys requested declaratory judgment quieting title to the Disputed Property in them exclusively, excepting the approximately one-quarter-acre "Small Parcel" conveyed to Thelma Bailey Patty and her husband in 1959. Following the death of Robert W. Bailey on February 1, 2013, Richard Neal Bailey filed a suggestion of death with the trial court. On February 27, 2013, the trial court entered an agreed order, granting a joint motion to convert the trial to a hearing on summary judgment motions. On March 20, 2013, the Littletons filed an answer to the amended third-party complaint, requesting declaratory judgment as to the parties' relative percentage ownership interests in the Disputed Property. The Littletons refuted the Baileys' claim of title by prescription, claiming that their ignorance of their ownership interest prevented establishment of title by prescription.

Following a bench hearing conducted on April 16, 2013, the trial court found that "the doctrines of title by prescription and estoppel by deed are not applicable to the undisputed facts of this case . . . ." The court granted summary judgment in favor of the Littletons and denied the Baileys' motion for summary judgment. In a final judgment entered on August 15, 2013, the court vested title to the 58-acre Disputed Property, excepting the Small Parcel, to the parties "as tenants in common in the following people in the following percentages":

(i) 33.33% undivided interest in Richard Bailey;

(ii) 33.33% undivided interest in Lisa Bailey Dishner;

(iii) 16.67% undivided interest in Charlotte Dutton;

(iv) 8.335% undivided interest in Dale Littleton;

(v) 4.1675% undivided interest in Kimber Littleton;

(vi) 4.1675% undivided interest in Mark Lee Littleton.[6]

The trial court vested title to the approximately one-quarter-acre Small Parcel to the parties "as tenants in common in the following people in the following percentages":

(i) 79.165% undivided interest in Charlotte Dutton;

(ii) 2.0825% undivided interest in Richard Bailey;

(iii) 2.0825% undivided interest in Lisa Dishner;

(iv) 8.335% undivided interest in Dale Littleton;

(v) 4.167% undivided interest in Kimber Littleton;

(vi) 4.167% undivided interest in Mark Lee Littleton.

The Baileys timely appealed.

[6]Alice Littleton, the mother of Kimber and Mark Lee Littleton, voluntarily withdrew any claim of ownership interest in the Disputed Property.

II. Issues Presented

The Baileys present two issues on appeal, which we restate as follows:

1. Whether the trial court erred by concluding that the Baileys had not established title by prescription to the Disputed Property.

2. Whether the trial court erred by determining that the Littletons' claim to the Disputed Property was not barred by estoppel by deed.

III. Standard of Review

Our Supreme Court has succinctly described the applicable[7] standard of review of a trial court's grant of summary judgment:

> A summary judgment is appropriate only when the moving party can demonstrate that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 5 (Tenn. 2008). When ruling on a summary judgment motion, the trial court must accept the nonmoving party's evidence as true and resolve any doubts concerning the existence of a genuine issue of material fact in favor of the nonmoving party. *Shipley v. Williams*, 350 S.W.3d 527, 536 (Tenn. 2011) (quoting *Martin v. Norfolk S. Ry.*, 271 S.W.3d 76, 84 (Tenn. 2008)). "A grant of summary judgment is appropriate only when the facts and the reasonable inferences from those facts would permit a reasonable person to reach only one conclusion." *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 364 (Tenn. 2009) (citing *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000)). "The granting or denying of a motion for summary judgment is a matter of law, and our standard of review is de novo with no presumption of correctness." *Kinsler v. Berkline, LLC*, 320 S.W.3d 796, 799 (Tenn. 2010).

[7]The recently enacted Tennessee Code Annotated § 20-16-101 (Supp. 2012), 2011 Tenn. Pub. Acts 498, is applicable only to cases commenced on or after July 1, 2011, and therefore is not applicable to this case. Tennessee Code Annotated § 20-16-101 provides a standard of review for summary judgment with the stated purpose "to overrule the summary judgment standard for parties who do not bear the burden of proof at trial set forth in *Hannan v. Alltel Publishing Co.*, its progeny, and the cases relied on in *Hannan*." *See Sykes v. Chattanooga Hous. Auth.*, 343 S.W.3d 18, 25 n.2 (Tenn. 2011).

Dick Broad. Co. of Tenn. v. Oak Ridge FM, Inc., 395 S.W.3d 653, 671 (Tenn. 2013). Pursuant to Tennessee Rule of Civil Procedure 56.04, the trial court must "state the legal grounds upon which the court denies or grants the motion" for summary judgment, and our Supreme Court has recently instructed that the trial court must state these grounds "before it invites or requests the prevailing party to draft a proposed order." *Smith v. UHS of Lakeside, Inc.*, ___ S.W.3d ___, No. W2011-02405-SC-R11-CV, 2014 WL 3429204 at *12 (Tenn. July 15, 2014).

In the case at bar, the relevant facts are undisputed, and therefore whether the trial court erred in granting summary judgment hinges on whether the Littletons demonstrated that they were entitled to conclusions of law that (1) the Baileys had not established title by prescription and (2) their undivided ownership interests were not barred by estoppel by deed.

IV. Title by Prescription

The Baileys contend that the trial court erred by failing to find that they had absolute fee simple title by prescription to the Disputed Property. In particular, they argue that the trial court erred in finding that prior to the initiation of the boundary dispute action in March 2009, the Littletons were prevented from pursuing their ownership interest by their ignorance of their rights as co-tenants. The Littletons contend that the trial court properly found that they had rebutted the Baileys' presumption of title by establishing that their ignorance of their ownership interest operated as a disability that kept them from knowing that the Baileys possessed the Disputed Property adversely. Although we are unconvinced that the Baileys' ignorance of their ownership rights was *per se* a disability, we nonetheless determine that under the particular facts of this case, the trial court did not err in denying the Baileys fee simple title by prescription.

The common law doctrine of title by prescription applies when a presumption of title arises "by an exclusive and uninterrupted possession of the land by one tenant in common for twenty or more years, claiming the same as his own, without any recognition of his co-tenants or claim upon their part." *See Brown v. Daly*, 968 S.W.2d 814, 817 (Tenn. Ct. App. 1997) (citing *Morgan v. Dillard*, 456 S.W.2d 359, 363 (Tenn. Ct. App. 1970)). A non-possessing co-tenant may rebut a possessing co-tenant's evidence of title by possession either by demonstrating that (1) "the possession was by the permission or indulgence of the other co-tenants" or (2) "one or more of the co-tenants were under a disability, such as the disability of minority during the requisite twenty year period." *See Amos v. Taylor*, No. M2006-02170-COA-R3-CV, 2008 WL 1891443 at *5 (Tenn. Ct. App. April 28, 2008) (citing *Walker v. Moore*, 745 S.W.2d 292, 295-98 (Tenn. Ct. App. 1987)).

Pursuant to Tennessee Rule of Civil Procedure 56.04, the trial court in its final judgment stated the legal grounds upon which it granted the Littletons' and Ms. Dutton's motion for summary judgment and denied the Baileys' motion. In pertinent part, the court explained:

> On the basis of the authorities briefed and cited by Third Party Defendants, the Court . . . finds and concludes that the doctrine of title by prescription does not apply to divest Third Party Defendants of their interests in the property hereinafter described by reason of the fact that the Third Party Defendants, as tenants in common with the Third Party Plaintiffs, had no knowledge until 2009 of their interest in said property.

It is undisputed that the Baileys maintained exclusive and uninterrupted possession of the Disputed Property, including paying property taxes, from at least the time of Pearl Bailey's death in 1983 through the initiation of this action in 2009. It is also undisputed that Robert and Fay Bailey's possession of the Disputed Property may be tacked onto the subsequent possession by their children, Richard Neal Bailey and Lisa Dishner Bailey. *See Eckhardt v. Eckhardt*, 305 S.W.2d 346, 348 (Tenn. Ct. App. 1957), *perm. denied* (Tenn. Oct. 4, 1957) (explaining that the successor in possession could tack her predecessor's possession to her own). Inasmuch as the Littletons were under the belief until 2009 that the 1957 deed conveyed to Robert and Fay Bailey absolute fee simple title, they make no claim of rebutting the presumption through having granted permission for or openly indulging the Baileys' possession of the Disputed Property. Instead, they assert that they rebutted the presumption by establishing that ignorance of their ownership interests operated as a disability preventing them from pursuing those interests.

The Baileys respond by arguing that the concept of disability in this context applies to a party that was not *sui juris*, meaning not of full age and capacity to sue or acquiesce in the prescription of title, during the time period that possession was established. We agree that lack of knowledge of co-tenancy does not, *per se*, constitute a "disability" under the doctrine of title by prescription. *See Scruggs v. Baugh*, 3 Tenn. App. 256, 263 (Tenn. Ct. App. 1926) (interpreting the analysis of whether co-tenants were under disabilities as whether "they were not sui juris or capable of granting a right"); *see also* 1475 BLACK'S LAW DICTIONARY (8th ed. 2004) (defining *sui juris* in relevant part as "[o]f full age and capacity"; "[p]ossessing full social and civil rights").

Our analysis of this issue does not end, however, with whether the Littletons' and Ms. Dutton's lack of knowledge constituted an actual disability. We must also consider the relationship among the Baileys, the Littletons, and Ms. Dutton, who were all descendants of N.B. and Pearl Bailey and all co-tenants of the Disputed Property, and whether the Baileys

were required to give their co-tenants active or constructive notice of ouster in order to establish title by prescription. The Baileys argue, in effect, that to consider this question is to improperly conflate the doctrines of adverse possession and title by prescription. We disagree.[8]

In the seminal case of *Drewery v. Nelms*, our Supreme Court explained the ouster of one tenant in common by another required in order to establish adverse possession as follows:

> The doctrine of adverse possession is to be taken strictly, and must be made out by clear and positive proof and not by inference, every presumption being in favor of a possession in subordination to the title of the true owner. The possession of one tenant in common, as a general proposition, is the possession of all. If one tenant in common enters upon the land it will be presumed that he enters for all, and his holding will continue as the possession of all, by construction, each having entire possession of the whole. To overturn this relationship or entirety of possession by all, there must be some plain demonstration that the party in actual possession has repudiated the right of his cotenants. There can be no adverse possession or disseisin by one tenant in common except by some act or conduct on his part which will produce an actual ouster of his cotenants.
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> This ouster by one tenant in common against his cotenant may occur, but it takes something more than an appropriation of the rents without an accounting. The mere silent, sole occupation by one of the entire property, though he be claiming the whole estate, and appropriating the whole rents, without an accounting to or claim by the others, without notice to his cotenant that his possession is adverse, and unaccompanied by some act which can amount to an exclusion and ouster of the cotenant, cannot be construed into an adverse possession. This ouster and exclusion may be effected by taking possession and affording actual notice of a claim of sole ownership or other

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[8]In support of their argument that the trial court improperly conflated the doctrines of adverse possession and title by prescription, the Baileys cite the trial court's oral statement at the close of trial that the Littletons' and Ms. Dutton's "ignorance of their rights as co-tenants is a disability to them, and therefore the *statutory period* would not have run as against them" (emphasis added). We note first that the trial court expressly removed language from its written final judgment that would have incorporated its oral ruling. *See Heath v. Memphis Radiological Prof'l Corp.*, 79 S.W.3d 550, 556 (Tenn. Ct. App. 2001) ("[A] court speaks through its written orders."). Moreover, upon a thorough review of the record, we find no indication that the trial court misapprehended the requisite common law period of at least twenty years for establishment of title by prescription. *See Amos*, 2008 WL 1891443 at *5.

> positive and unequivocal act that must by its nature put the other cotenants upon notice that they are excluded from the possession.

177 S.W. 946, 947-48 (Tenn. 1915). The *Drewery* Court then explained how a presumption of title[9] could similarly arise:

> A presumption of title in such cases may also arise, upon the same ground that a grant from the state is presumed, by an exclusive and uninterrupted possession of the land by one tenant in common for 20 or more years, claiming the same as his own, without any recognition of his cotenants or claim upon their part.
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> This is an inference of fact which may be deduced from the whole proof on the subject. This presumption arises independent of the statute of limitations. It may be rebutted by the infancy or other disability of the parties, their actual relationship, or other facts showing the possession was not adverse but by the indulgence, permission, or as tenant of the owner. Disabilities may accumulate to rebut the presumption, which is unlike the statute of limitations. *Marr v. Gilliam*, 1 Cold. 488; *Hubbard v. Wood*, 1 Sneed, 279; *McClung v. Ross*, 5 Wheat. 116, 5 L. Ed. 46; *McCorry v. King*, 3 Humph. 267, 39 Am. Dec. 165; *Brock v. Burchett*, 2 Swan, 27.

Id. at 948 (reversing the trial court's grant of an ejectment and holding that the possessor of the land failed to present "that clear and unmistakable proof necessary to show a holding by [the possessor] to the exclusion of his cotenants of such character as will be held to presume that they knew he was claiming adversely to them.").

In *Eckhardt*, decided in 1957, this Court appeared to settle the question of whether an actual or constructive ouster must be proven to establish title by prescription, concluding that when both the possessor and her co-tenants believed and behaved as if the possessor owned a city lot for approximately twenty years prior to initiation of the action, the possessor established a presumption of title even though there was insufficient proof of ouster or any act noticing the co-tenants that the holding was adverse. *See Eckhardt*, 305 S.W.2d at 347. This Court, however, revisited that result in *Hampton v. Manuel*, 405 S.W.2d 47, 51 (Tenn. Ct. App. 1965), *perm. denied* (Tenn. July 6, 1965), concluding that "the rule of *Eckhardt v. Eckhardt*" does not apply to all situations in which title by prescription is claimed. Because

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[9]Because the doctrine of title by prescription depends upon a presumption of title arising through possession, the doctrine is interchangeably referred to as "presumption of title." *See, e.g., Brown*, 968 S.W.2d at 817.

the relevant *Hampton* analysis and application of case law is pertinent to the instant action, we present it extensively as follows:

> By assignment of error No. III the appellant, Fred Hampton, insists that the court was in error in failing to hold that he was the owner of the entire fee in the property by virtue of the doctrine of presumption of title arising out of his continuous, exclusive, uninterrupted possession beginning with the abandonment of him and the property by Flora Hampton in 1934 and continuing more than twenty years and up until April, 1963.
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> By assignment of error No. IV the appellant, Fred Hampton, insists that his divorce from Flora Hampton in 1944 amounted to an ouster of her as a tenant in common in said property and that he had continued in the exclusive uninterrupted possession of said property for a fraction less than the full twenty year period and that he was entitled to the fee simple title to said property.
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> In support of assignment of error No. III relating to presumption of title or the presumption of lost grant accompanied by exclusive and uninterrupted possession for more than twenty years, solicitor for appellant in his excellent brief very forcefully argues that under the doctrine of presumption of title, an ouster need not be proved but is to be presumed by the trier of fact, if not rebutted; that the distinction between adverse possession under the statutes of limitations and the doctrine of presumption of title is that under the former an actual ouster or its equivalent must be proven whereas under the latter an ouster will be presumed. He cites and relies upon *Marr's Heirs v. Gilliam*, 41 Tenn. 488, (1860); *Burns v. Headerick*, 85 Tenn. 102, 2 S.W. 259; *Drewery v. Nelms*, 132 Tenn. 254, 177 S.W. 946 (1915); *Valley v. Lambuth*, (Western Section, 1926), 1 Tenn. App. 547; *Taylor v. Blackwell* (1918), 141 Tenn. 184, 207 S.W. 738.
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> Finally solicitor relies most strongly upon the following quotation from *Eckhardt v. Eckhardt*, 43 Tenn. App. 1, 305 S.W.2d 346, (Middle Section, 1957):
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> 'So, while she failed to make out her title to this lot by adverse possession under our statue of limitations, we think she did make out her title by prescription or 20 years exclusive and uninterrupted possession. Under the above authorities, she could tack her husband's possessions to her own, and the two of them have exclusive and uninterrupted adverse possession for more

than 20 years, claiming the entire interest, taking the whole rents and profits, without accounting to the cotenants. This was sufficient to warrant a finding of title in her under a grant that had been lost.' *Eckhardt v. Eckhardt*, *supra*, 305 S.W.2d 346 at 348.

Except for the cases of *Moore v. Cole*, 1956, 200 Tenn. 43, 289 S.W.2d 695, and *Memphis Housing Authority v. Mahoney*, 50 Tenn. App. 117, 359 S.W.2d 851, February 21, 1962, this member of the court would be disposed to apply the rule of *Eckhardt v. Eckhardt* to this case.

In *Memphis Housing Authority v. Mahoney*, *supra*, the litigation arose out of a condemnation suit as in the case at bar. Caroline S. Henry had owned a house and lot in Memphis by deed dated September 28, 1881. The property was sold for non-payment of taxes and on March 30, 1905, a tax deed was executed to Phillip Miller, Husband of Caroline Henry Miller. They left three children, John Miller, Frank Miller and Ida Miller. Apparently there was no will and Ida Miller occupied the property until her death on June 26, 1937.

Phillip William Mahoney, one of the children of Ida Miller, took possession of the house and lot on the death of Ida Miller Mahoney, collected the rents, paid taxes and made repairs and made no accounting to any of the other heirs of Caroline S. Miller, Phillip Miller, or his mother, Ida Miller Mahoney. Phillip William Mahoney [died] on January 7, 1959, more than 20 years after the death of his mother. He devised the property to his widow, the petitioner, Mrs. Lola Mae Mahoney, who held the property as devisee until the condemnation suit was filed by the Memphis Housing Authority. Mrs. Lola Mae Mahoney contended that she and her husband, Phillip Mahoney, had perfected full title to the house and lot by over twenty years possession. There was no proof that any of the other heirs of Caroline Henry or Ida Miller exercised any control over the house and lot after the death of Ida Miller in 1937 or that Mr. or Mrs. Mahoney ever recognized any of them as co-tenants. The Trial Judge held adversely to Mrs. Mahoney. She appealed and this court affirmed the lower court.

Judge Bejach of this court reviewed the many Tennessee cases relating to property owned by tenants in common. It was the opinion of this court that the case of *Moore v. Cole*, 1956, 200 Tenn. 43, 289 S.W.2d 695, opinion by Mr. Justice Burnett, was controlling. Judge Bejach quoted at length from the opinion of Justice Burnett including the following quotation from *Drewery v. Nelms*, 132 Tenn. 254, 177 S.W. 946:

"The authorities generally in this State support this statement. Certainly to constitute an ouster of one tenant in common the evidence that there has been an ouster must be much stronger as between these tenants in common than as between mere strangers. When one attempts to set up an ouster as between tenants in common the evidence should be viewed by the court most strongly against that person who attempts to set up an ouster and in favor of the tenant in common who makes no such attempt. *Drewery v. Nelms*, 132 Tenn. 254, 177 S.W. (946) 956.' *Moore v. Cole*, 200 Tenn. 50, 51-52, 289 S.W.2d 689-699 (695).

'In the light of the above quotation, which is the last word of the Supreme Court on the subject, and in view of the fact that, after a careful reading of the record, we cannot say that the evidence in this cause preponderates against the ruling of the trial judge, we hold that the appellant has not made out her claim of exclusive ownership of the property here involved, acquired by prescription.'

In the case of *Moore v. Cole* the litigation was over a house and lot in Memphis, Tennessee, between the ultimate grantee of one R.D. Casey and the heirs of his first wife, Elizabeth Casey. The house and lot in 1914 was conveyed to R.D. Casey and wife, Elizabeth Casey, as equal tenants in common. In 1927 Elizabeth Casey died without children. In 1928, R.D. Casey married Eva Casey and they occupied the house and lot over twenty years and until 1950 when Robert Casey died. He devised the property to his second wife, Eva Casey, who in turn sold it to the defendant, Lizzie B. Moore.

On March 7, 1941, Robert Casey and wife, Eva, had executed a warranty deed to one Lula Williamson who immediately executed a warranty deed to the same property back to Robert Casey and wife, Eva Casey, as tenants by the entirety. Lula Williamson never took possession of the property.

The heirs of Elizabeth Casey, namely Edna H. Cole and others, brought suit against Lizzie B. Moore who contended that R.D. Casey and wife, Eva B. Casey, obtained title to Elizabeth Casey's interest in the property by adverse possession. The Chancellor held in favor of the heirs of Elizabeth Casey. On appeal to this court we held that R.D. Casey and wife, Eva B. Casey, had established title to the property by seven years adverse possession under T.C.A. Section 28-201 claiming title under the deed from Lula Williamson to them and that such deed was effective as an ouster of the heirs of Elizabeth Casey. The Tennessee Supreme Court reversed this court, sustained the action

> of the Chancellor and held that there had been no ouster of the heirs of Elizabeth Casey after her death in 1927. No mention was made by Mr. Justice Burnett of the doctrine of presumption of lost grant.
>
> *Eckhardt v. Eckhardt*, 43 Tenn. App. 1, 305 S.W.2d 346 was decided by the Middle Section of this Court in 1957 shortly after our Tennessee Supreme Court announced *Moore v. Cole* but the *Eckhardt* case did not mention *Moore v. Cole*.

Hampton, 405 S.W.2d at 50-52.

In the more recent decision of *Denton v. Denton*, 627 S.W.2d 124, 127 (Tenn. Ct. App. 1981), this Court reversed the trial court's finding that the possessor had held the land adversely where "both he and the other co-tenants [were] ignorant of the existence of the co-tenancy." Although the doctrine at issue in the *Denton* case was adverse possession, the *Denton* Court cited the *Hampton* analysis above with approval. *Id.* at 127-29 (noting also that "[i]n each of the cases where our courts have held that one co-tenant held adversely to other co-tenants, it has been based on the circumstances peculiar to the particular case."); *see also Howell v. Howell*, No. 01A01-9806-CV-00301, 1999 WL 536261 at *10 (July 27, 1999) ("The issue presented and decided by the *Denton* court is precisely the issue before this Court: whether parties ignorant of the fact that they are co-tenants may oust one another and adversely possess property. The *Denton* court found that they may not, and we agree.").

In support of their position, the Littletons rely in part on this Court's decision in *Hydas v. Johnson*, 187 S.W.2d 534, 535 (Tenn. Ct. App. 1944), *perm. denied* (Tenn. Nov. 14, 1944). In *Hydas*, as in the instant action, one descendant of a couple who had purchased property during the gap years of 1914 to 1919 had been thought by the other descendants to be in full possession of the disputed property prior to instigation of the action. *See id.* at 534-35. ("There was no notice to complainants of a hostile possession by defendant to arouse them to active investigation and assertion of their rights and it is this which the law requires before the cotenant's presumptively friendly possession can be converted into one of a hostile character."); *see also Denton*, 627 S.W.2d at 127-28 (citing *Hydas* as the "leading case in this jurisdiction" on the issue of whether ignorance of a cotenant of his cotenancy defeats a claim of adverse possession).

As the Littletons acknowledge, the doctrine at issue in *Hydas* was adverse possession. We agree, however, that the particular, undisputed facts underlying the instant action are comparable to those in *Hydas* in that, prior to initiation of the boundary line dispute in 2009, there was no notice to the Littletons or Ms. Dutton that would have "arouse[d] them to active investigation and assertion of their rights." *See id.* at 535. In an attempt to establish notice

of ouster to their co-tenants, the Baileys assert the general rule that recordation of a chain of title gives constructive notice to all parties in that chain. *See* Tenn. Code Ann. § 66-26-102; *Blevins v. Johnson County*, 746 S.W.2d 678, 682-83 (Tenn. 1988). This assertion is unavailing in that the Littletons and Ms. Dutton could not have discovered their co-tenancy in the Disputed Property by searching the recorded chain of title alone.

As this Court concluded in *Hampton*, we determine that:

> "Certainly to constitute an ouster of one tenant in common the evidence that there has been an ouster must be much stronger as between these tenants in common than as between mere strangers. When one attempts to set up an ouster as between tenants in common the evidence should be viewed by the court most strongly against that person who attempts to set up an ouster and in favor of the tenant in common who makes no such attempt."

Hampton, 405 S.W.2d at 51-52 (quoting *Moore v. Cole*, 289 S.W.2d 689, 695 (Tenn. 1956) (in turn quoting *Drewery*, 177 S.W. at 956)).

Upon a thorough review of the record and the relevant case law, we conclude that the Baileys were unable to present sufficient evidence of a presumptive ouster of their co-tenants. We expressly do not extend this conclusion to hold that in all cases in which title by prescription is pled, actual or constructive ouster of a non-possessing co-tenant by a possessing co-tenant must be proven for a presumption of ouster to exist. However, we are in agreement with this Court's previous rejection in *Hampton* of the proposition that a presumptive ouster simply may be assumed under the doctrine of title by prescription. *See Hampton*, 405 S.W.2d at 51. These parties, these co-tenants, are not mere strangers but are common descendants of N.B. and Pearl Bailey, who acquired the entire 100-acre property as tenants in common during the gap years of January 1, 1914 through April 16, 1919. In light of the parties' undisputed ignorance of the Littletons' and Ms. Dutton's co-tenancy in the Disputed Property, we conclude that under the particular, undisputed facts of this action, the Baileys failed to establish presumptive ouster of their non-possessing co-tenants. The trial court did not err by concluding, as a matter of law, that the Baileys failed to establish title by prescription to the Disputed Property.

V. Estoppel by Deed

The Baileys contend that the trial court erred by failing to find that the Littletons' and Ms. Dutton's interest in the Disputed Property was barred by the doctrine of estoppel by deed. In particular, they argue that language contained in the September 22, 1990 quitclaim deed conveying Naomi Bailey Littleton's interest in the original 100 acres, *excepting* the 58-

acre Disputed Property, to Robert W. Bailey ("Bailey-Littleton Deed") operated to estop the Littletons from claiming any ownership interest in the Disputed Property. The Littletons contend that the trial court properly found the doctrine of estoppel by deed inapplicable to the undisputed facts of this case. We agree with the Littletons.

"'Estoppel by deed is a bar which precludes one party to a deed and his privies from asserting as against the other party and his privies any right or title in derogation of the deed or from denying the truth of any material facts asserted in it.'" *Denny v. Wilson County*, 281 S.W.2d 671, 675 (Tenn. 1955) (quoting 19 Am. Jur., *Estoppel*, § 6). "[A]ll persons, including heirs, claiming through the party estopped by deed are bound by the estoppel." *Duke v. Hopper*, 486 S.W.2d 744, 748 (Tenn. Ct. App. 1972). Our Supreme Court has further defined estoppel as follows:

> 'Equitable estoppel or estoppel in pais is the principle by which a party who knows or should know the truth is absolutely precluded, but at law and in equity, from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, charging his position in such a way that he would suffer injury if such denial or contrary assertion were allowed.'

Union Trust Co. v. Williamson County Bd. of Zoning Appeals, 500 S.W.2d 608, 616-17 (Tenn. 1973) (quoting *Lawrence County v. White*, 288 S.W.2d 735 (1956)). "[T]he party seeking to assert the doctrine of estoppel must be one who is 'excusably ignorant of the true facts and who had a right to rely' upon the representations of another." *Id.* at 617 (quoting *Lawrence County*, 288 S.W.2d at 738).

At issue in the Bailey-Littleton Deed are two paragraphs that follow the property description of the original 100 acres:

> HOWEVER, there has heretofore been conveyed off various parcels of land, and they are EXCEPTED from this Deed and all that is now remaining is 42.9 acres, more or less and it is the intention of this Deed to convey all of the property that is now owned by Mrs. Pearl Bailey.
>
> Mrs. Pearl Bailey was the owner of the entire interest in this property as the surviving tenant by the entirety, her husband, N.B. Bailey having since died.

The Baileys assert that the Littletons, as successors in title to Naomi Bailey Littleton, are estopped from denying the "material fact" asserted in the deed that Pearl Bailey was the owner of the entire interest in the original 100 acres as surviving tenant by the entirety. The Littletons assert that the Baileys cannot properly invoke the doctrine of estoppel by deed to establish a property right, only to protect one. *See McLemore v. Memphis & C.R. Co.*, 69 S.W. 338, 344 (1902) ("Estoppel can never be invoked to establish facts . . . ."). We agree. The Baileys are in essence arguing a legal fiction, that somehow the 100% ownership interest they now acknowledge Pearl Bailey did not have to convey was created by the erroneous provision in the Littleton-Bailey Deed. Moreover, as the Littletons note, the deed at issue did not convey any part of the Disputed Property, that property having been excepted from the conveyance. Therefore, the Baileys cannot claim to have relied upon a representation made by Naomi Littleton in the Littleton-Bailey Deed to their detriment. This issue is without merit.

VI. Conclusion

For the reasons stated above, the trial court's summary judgment in favor of the Littletons and Ms. Dutton, quieting title to the Disputed Property among the parties as tenants in common in specified percentages, is affirmed. Costs on appeal are taxed to the appellants, Richard Neal Bailey and Lisa Bailey Dishner. This case is remanded to the trial court, pursuant to applicable law, for enforcement of the trial court's judgment and collection of costs assessed below.

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THOMAS R. FRIERSON, II, JUDGE