

FILED

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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 1, 2020 Session

ANTHONY RENTALS v. MARK B. SAGERS ET AL.

Appeal from the Chancery Court for Davidson County
No. 17-976-II Anne C. Martin, Chancellor

No. M2019-01237-COA-R3-CV

This appeal arises out of a dispute concerning an express, ingress and egress easement across the defendant's property. The principal issue is whether the plaintiff abandoned the easement by failing to maintain the easement in a condition permitting it to be used for access and/or by acquiescing in the acts of others that reduced the utility of the easement. Following a bench trial, the court determined the defendant failed to prove abandonment by clear and convincing evidence. Having determined that the evidence does not preponderate against the findings by the trial court, we affirm.

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

FRANK G. CLEMENT JR., P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and W. NEAL MCBRAYER, JJ., joined.

Mark B. Sagers, Ashland City, Tennessee, Pro se.

Wesley H. Southerland, Brentwood, Tennessee, for the appellee, Anthony Rentals.

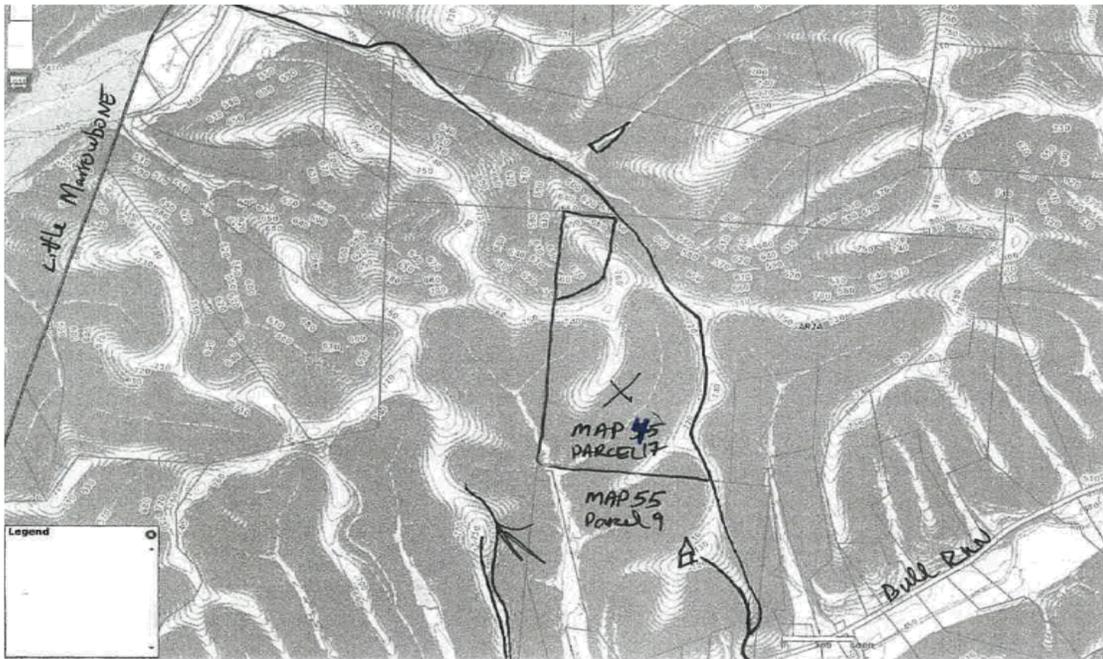
OPINION

Anthony Rentals, a general partnership comprised of two sisters, Sharon and Donna Anthony, ("Plaintiff") owns a parcel of over 50 acres of undeveloped, wooded land identified as "Map 45, Parcel 17" (the "Anthony property").¹ Mark B. Sagers ("Defendant") owns a parcel identified as "Map 55, Parcel 9" (the "Sagers property"), which consists of approximately 50 acres. The Sagers property directly fronts Bull Run Road and lies immediately south of the Anthony property, which is not adjacent to a public

¹ Sharon and Donna Anthony inherited the Anthony property from their father who acquired the property at auction in 1962.

roadway. Both properties are located in the Scottsboro area of Davidson County, Tennessee, between Bull Run Road and Little Marrowbone Road.

The easement at issue, which runs across the Sagers property from Bull Run Road to the Anthony property, was previously a public road known as Old Post Road or Old Mail Route Road (“Old Road”).² From Bull Run Road, the driveway to the Sagers property is on the easement for 500 to 600 feet and then veers left of the easement toward Defendant’s house. Where the driveway veers left, the easement continues north toward the Anthony property for another 200 to 300 feet. This stretch of easement leading north to the Anthony property is unpaved, varies in width from eight to 13 feet, and a portion of the easement is impassible by automobile. Below is a map showing the location of the properties and the easement:



In 1961, the Davidson County Chancery Court granted Plaintiff’s predecessors in interest an access easement in the Old Road from the entrance at Bull Run Road, and this court affirmed that decision in *Payton v. Richardson*, 356 S.W.2d 289 (Tenn. Ct. App. 1961). Plaintiff’s warranty deed contained an express grant of the easement over the Sagers property:

² It is undisputed that, in the last 50 years or so, the Old Road was abandoned for public use and is currently a private road. “Owners of property abutting a once public road continue to have a private access easement over that road to their property even after the road loses its character as a public road.” *Hall v. Pippin*, 984 S.W.2d 617, 620 (Tenn. Ct. App. 1998) (citing *Knierim v. Leatherwood*, 542 S.W.2d 806, 810 (Tenn. 1976)).

Together with an easement for right-of-way over Old Post Road or Old Mail Route Road running northwardly from Bull Run Road, as set out in the decree entered in Minute Book 187, page 162, Chancery Court at Nashville, in this cause of William M. Payton, Jr. and wife vs. E. Newsom Richardson and wife, Rule No. 83027, said Court. This conveyance is made subject to an easement for right-of-way of Old Post Road lying within the boundaries of the premises herein described.

While Defendant's warranty deed did not specifically reference the easement, it stated that the property was "subject to any and all existing easements and restrictions as shown of record." Defendant testified at the trial that he was aware of the easement when he purchased the property in 2005, and the easement's status as an express easement is not in dispute.

In 2016, Plaintiff hired a real estate agent to market and sell the Anthony property. At that time, Plaintiff became aware of the gate Defendant erected across the portion of the easement that constituted his driveway, which blocked Plaintiff's use of the easement for ingress and egress. When Plaintiff attempted to gain access, Defendant informed Plaintiff that he disputed Plaintiff's right to an easement across his property. On September 8, 2017, Plaintiff filed a verified complaint against Defendant in Davidson County Chancery Court for declaratory and injunctive relief and monetary damages.³ Defendant filed an answer on October 12, 2017, denying Plaintiff's right to the easement, and, thereafter, the parties proceeded with discovery.

The court held a bench trial on April 15–16 and May 14–15, 2019. At the trial, Defendant asserted two defenses: (1) Plaintiff abandoned the easement, and (2) the Old Road was not necessary for Plaintiff to access the Anthony property because there was an alternative access at Little Marrowbone Road.

On June 11, 2019, the court entered a memorandum and order determining that Plaintiff had a right to an easement across Defendant's property, running with the land, within the confines of the Old Road.

In addressing Defendant's abandonment defense, the trial court applied the factors enumerated by this court in *Hall v. Pippin* and considered whether Plaintiff (1) made statements disavowing the easement, (2) failed to maintain the easement in a passable condition, (3) acquiesced in acts by others to reduce the utility of the easement, (4) erected a permanent obstruction to block access, or (5) developed an alternative access to the property. 984 S.W.2d 617, 621 (Tenn. Ct. App. 1998).

³ Plaintiff later amended its complaint to add the owners of an adjacent parcel, James and Deborah Upchurch, as indispensable parties because the proposed easement partially encroached on their property. The Upchurches did not oppose the requested relief, and they are not parties to this appeal.

Applying the *Hall* factors, the court made the following findings:

Defendant has not demonstrated, by clear and unequivocal evidence, that Plaintiff abandoned the easement across the Sagers Property. Although the Anthony family's visits to the Anthony Property have been few and far between, and they have not chosen to develop it or make regular use of it in the over 50 years they have owned it, limited use or even nonuse is not an affirmative showing of an intention to abandon the easement.

Mr. Sagers has not presented any statements indicating an intention to abandon. In fact, the dispute arose when he was contacted by Plaintiff's real estate agent because of its intention to use the easement to access the Anthony Property with potential purchasers.

Plaintiff has not maintained the easement, but the proof is that it would be relatively inexpensive to clear the limited section that needs clearing to be passable. Defendant cleared the first 500-600 feet of the Old Road easement from Bull Run Road before it veers toward his house. There is another 200-300 feet of the Old Road that traverses north toward the Anthony Property that Plaintiff would need to clear and maintain at its own expense. The Court does not find Plaintiff's lack of involvement in Defendant's construction of his driveway to be an indication of abandonment. . . .

Defendant installed a gate across the entrance to the easement from Bull Run Road, which gate was only accessible by him, sometime after his purchase of the Sagers Property in 2005. The existence of that gate remained unquestioned until 2016, when Plaintiff decided to list the Anthony Property for sale. Prior to the erection of the gate, for many years, there was a metal cable between two poles "blocking" the entrance. That barricade did not prevent the Anthony family from accessing the easement to the Anthony Property. The gate installed by Defendant is not an indication that Plaintiff abandoned the easement—Plaintiff did not install it nor is it a permanent obstruction.

[T]he proof is clear that Plaintiff never developed an alternative access to the Anthony Property. The only access the Anthony family ever used was via the easement across the Sagers Property.

As for Defendant's lack of necessity defense, the court found, based on the testimony and other evidence at the trial, that the Little Marrowbone Road access was "not reasonable and practical given the difficulties with the terrain, the potential cost to improve

the route to make it usable, the number of neighbors who would be affected, the environmental permitting requirements, and the distance.”⁴ This appeal followed.

STANDARD OF REVIEW

We accord a presumption of correctness to the trial court’s factual findings following a bench trial, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Morrison v. Allen*, 338 S.W.3d 417, 425 (Tenn. 2011). We subject a trial court’s conclusions of law to a de novo review with no presumption of correctness. *See Ray Bell Constr. Co., Inc. v. State, Tenn. Dep’t of Transp.*, 356 S.W.3d 384, 386 (Tenn. 2011).

ANALYSIS

Defendant presented four issues for our review.⁵ We, however, have determined that the dispositive issue on appeal is whether Defendant presented clear and convincing evidence to establish that Plaintiff abandoned the easement.

To prove abandonment, the proponent must show “not only an intention to abandon the easement but also external acts carrying that intention into effect.” *Hall*, 984 S.W.2d at 620. Nonuse of the easement, alone, is insufficient to prove abandonment and must be combined with evidence of the easement holder’s intent to abandon the easement. *Id.* at 620–21. The proponent may prove abandonment by a single act or a series of acts. *Id.* at 621. The court may consider

- (1) statements by the easement holder acknowledging the easement’s existence and disavowing its use,
- (2) the easement holder’s failure to maintain the easement in a condition permitting it to be used for access,
- (3) the easement holder’s acquiescence in the acts of others that reduce the utility of the easement,
- (4) the easement holder’s placement of a permanent

⁴ The court also authorized Plaintiff to improve and widen the easement to 12 feet. Defendant does not challenge this ruling on appeal.

⁵ Defendant phrases the issues as follows:

- I. Whether the Chancery Court erred in ruling that an easement exists [through] Appellant’s property. Specifically, did the trial court err when applying *Hall v. Pippin* with regard to abandonment.
- II. If the Appellee did abandon the easement through Appellant’s property, did the trial court err by evaluating the Appellee’s alternative access since there is no necessity.
- III. Whether the trial court erred when determining if the Appellee’s alternative access is reasonable and practical [and] by not allowing Appellant’s expert witness to testify regarding slope calculations of the Metro Map System.
- IV. Whether the trial court’s decision was equitable.

obstruction across the easement, or (5) the easement holder's development of alternative access in lieu of the easement.

Id.

“The party asserting abandonment of an easement must prove it by clear, unequivocal evidence.” *Id.* at 620. The question of whether the record contains clear and convincing evidence is a question of law that we review de novo with no presumption of correctness accorded to the trial court's decision. *White v. Empire Exp., Inc.*, 395 S.W.3d 696, 721 (Tenn. Ct. App. 2012). More specifically, under the clear and convincing standard, this court must “distinguish between the specific facts found by the trial court and the combined weight of those facts.” *Id.* (quoting *In re Samaria S.*, 347 S.W.3d 188, 200 (Tenn. Ct. App. 2011)). We review the court's individual factual findings de novo with a presumption of correctness, unless the preponderance of the evidence is otherwise. *Id.* We review the combined weight of those facts and whether they clearly and convincingly establish abandonment, de novo with no presumption of correctness. *Id.*

Defendant concedes that Plaintiff never made statements disavowing the easement, never placed a permanent obstruction across the easement, and never developed an alternative access to the Anthony property. Instead, Defendant relies on the second and third *Hall* factors to prove abandonment. He contends Plaintiff abandoned the easement by failing to maintain the easement in a passable condition. He also contends Plaintiff acquiesced to the reduction of the easement's utility by failing to remove the steel cable or gate across the easement.

In response, Plaintiff contends its failure to maintain the easement was a consequence of infrequent use and not an expression of Plaintiff's intent to abandon it. Plaintiff also contends that, while the steel cable may have deterred trespassers, it did not limit Plaintiff's access in any significant way. As for the locked gate installed by Defendant, Plaintiff contends it promptly initiated this action to enforce its rights upon learning of the gate's existence. Therefore, there was no acquiescence.

We will examine the two relevant factors in turn.

I. FAILURE TO MAINTAIN THE EASEMENT

The court concluded that, while the evidence established that Plaintiff failed to maintain the easement, this failure did not constitute abandonment. The court based its conclusion, in part, on the finding that “it would be relatively inexpensive to clear the limited section that needs clearing to be passable.” Defendant argues that the expense necessary to make the easement passable is irrelevant. But we find that the expense is relevant, in that, it speaks to the easement's condition.

Sharon Anthony testified that her father bought the Anthony property as an investment property, and because it was never developed, neither she nor her family members visited the property often. When asked why her family failed to maintain the easement, Ms. Anthony explained:

Well, there wasn't a residence or any kind of structure or anything that we had up there. And for most of all the years that we owned it, it was easy to get there. There wasn't a problem about pulling up, turning off of Bull Run Road and driving up there as far as you needed to go practically.

Mike Weesner, Ms. Anthony's husband, supported Ms. Anthony's testimony regarding the condition of the easement and the reasons for failing to maintain it. He testified that, for the most part, he and Ms. Anthony were able to reach the Anthony property using the easement, though part of it became impassible by vehicle over time. He explained that the property "was a piece of investment property the entire time," and they had "no reason to go there." Therefore, there "wasn't much use fixing up the easement."

Surveyor, Patrick Coode, testified that, in his opinion, the easement was "passable" but "needed improvement." More specifically, Mr. Coode testified, "Just level it out and fill it in, you know. It has obviously worn over the years by rain and ruts and stuff like that."

Charlie Houston Green, owner of a construction and excavation company, testified that the majority of the necessary grade work would need to be performed on 100 to 150 feet of the easement. He also testified:

The Bull Run access is fairly – it's an easy access. It just needs to be more width to it for, you know, a drive to have proper drainage and utilities. There's one area where I said was grown up in the road, it needed to be repaired.

Although Plaintiff failed to maintain the easement, the evidence preponderates in favor of the trial court's finding that the easement was not in such poor condition that it indicated Plaintiff's intent to abandon it. Additionally, Ms. Anthony and Mr. Weesner's testimony supports a finding that Plaintiff's failure to maintain the easement was not for the purpose of abandoning the easement, but resulted from Plaintiff's infrequent need to visit the property.

II. ACQUIESCENCE

Defendant testified that, after Defendant and his former wife purchased the Sagers property in 2005, they built a home on it and cleared a portion of the easement to construct

a driveway leading to the home.⁶ At that time, a metal cable blocked the easement at the Bull Run Road entrance. As part of his renovations, Defendant removed the metal cable and replaced it with a gate to block public access across the driveway.

Defendant's and Plaintiff's neighbor, James Upchurch, testified that the cable "had been there for years" and "had a large lock on it." He described the cable as "attached to a tree on one side and a steel post on the other" and surmised that the cable was there to deter trespassers:

I was with the police department for 36 years here at Metro. And, you know, I have had numerous calls out there. We've had trespassers. We've had dumpers. We've had this, that and the other. That road through there has always been a problem, I mean, forever and a day, even since I was a child it has always been a problem.

Sharon Anthony testified that she remembered the cable across the easement, but, anytime she visited, "we either climbed over the cable . . . or we just lifted the cable off at one end and drove over it." When asked if she had an issue with the cable blocking her access to the property, she testified:

No, not really. And, frankly, it was a sort of a minimal obstruction, but it did help keep people out of there. And it is a rural area. And, you know, we did not want people abandoning stuff up there or dumping trash or whatever. So, you know, we didn't mind that the cable was there. It didn't obstruct us, but we hoped it deterred other people from going up there quite as easily.

Likewise, Mr. Weesner testified that, on one occasion when he visited the property with Ms. Anthony, they "just unhooked the cable, and that was fine." He testified that, on the other occasion, they "parked at the cable and just stepped over it and walked up the Old Post Road and went that way." In Mr. Weesner's opinion, the cable was there to deter trespassers: "I expect that that cable served a real purpose in that those remote areas wind up with a lot of trash and a lot of four-wheeling and, you know, just a real mess. And that cable was able to prevent that, to my knowledge."

The evidence preponderates in favor of the trial court's finding that the steel cable did not limit Plaintiff's access to the Anthony property in any significant way and, thus, did not indicate abandonment. As for Defendant's claim that Plaintiff acquiesced to the gate blocking Plaintiff's access, it is undisputed that Plaintiff was not aware of the gate until 2016. Moreover, upon learning of the gate, Plaintiff promptly informed Defendant of its need and intent to use the easement for ingress and egress to its property. When

⁶ After their divorce in 2017, the wife quitclaimed her interest in the property to Defendant.

Defendant refused to remove the lock from the gate or otherwise permit Plaintiff's use of the easement, Plaintiff commenced this action. Therefore, the evidence preponderates in favor of the trial court's finding that Defendant failed to establish that Plaintiff acquiesced to Defendant's acts to reduce the easement's utility.

For the foregoing reasons, we affirm the judgment of the trial court.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Mark B. Sagers.

FRANK G. CLEMENT JR., P.J., M.S.