FILED
02/09/2023
Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
January 19, 2023 Session

ARTHUR RAY NICELY, ET AL. v. JARROD W. ATKINS

Appeal from the Chancery Court for Grainger County
No. 2017-CH-88 Telford E. Forgety, Jr., Chancellor

No. E2022-00418-COA-R3-CV

This appeal concerns access to a spring on rural land. Arthur Ray Nicely and Henrietta Nicely ("Plaintiffs," collectively) sued Jarrod W. Atkins ("Defendant") in the Chancery Court for Grainger County ("the Trial Court") seeking to establish the boundary line between their respective properties. After a hearing, the Trial Court accepted the opinion of Defendant's surveyor as to the boundary line. The spring at issue was determined to be on Defendant's land, but the Trial Court also found an easement by implication whereby Plaintiffs may use water from the spring. Defendant appeals the Trial Court's finding of an easement by implication. We find that, while separation of title was proven, the other elements of an easement by implication, prior use and necessity, were not proven. Plaintiffs failed to prove any obvious, permanent, or long-established practice of their tract using water from the spring. In addition, should Plaintiffs wish to raise cattle, which is one of their stated reasons for requiring water from the spring, they can simply use a branch fed by the spring that crosses their property. The evidence preponderates against the Trial Court's findings. We reverse the Trial Court's finding of an easement by implication.

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

D. MICHAEL SWINEY, C.J., delivered the opinion of the court, in which JOHN W. MCCLARTY and THOMAS R. FRIERSON, II, JJ., joined.

Greg Brown and Daniel A. Sanders, Knoxville, Tennessee, for the appellant, Jarrod W. Atkins.

James D. Estep, III, Tazewell, Tennessee, for the appellees, Arthur Ray Nicely and Henrietta Nicely.

OPINION

Background

In November 2017, Plaintiffs sued Defendant in the Trial Court seeking to establish the boundary line between their respective properties in Grainger County. Defendant owns Tract 84.01. Plaintiffs own Tract 84.02. Plaintiffs alleged that Defendant claimed ownership of a spring on their property and had begun erecting a fence. Defendant filed an answer and counterclaim. Defendant asserted that the spring was located on his property. Defendant requested that the Trial Court, pursuant to Tenn. Code Ann. § 29-14-102, "determine and declare the location of the boundary line between the parties' properties, particularly with respect to the spring at issue…."

All of the land at issue once belonged to H.E. Nicely, Sr. and his wife Mertie Nicely.[1] In 1979, H.E. Nicely, Sr. and Mertie Nicely divided and conveyed their land to their children. Peggy Sue Nicely received Tract 84.02. She also received Tract 84, which contained the family home. A pipe channeled water from the spring for use by the home on Tract 84. Tract 84.01 went to H.E. Nicely, Jr. and his wife Betty Lou Nicely. H.E. Nicely, Sr. died in 1983. H.E. Nicely, Sr. had devised a will in 1978 addressing water usage, stating as relevant: "It is my will and desire that both Herbert [Nicely], Jr., and Peggy Sue [Nicely] have a right-of-way and the use of water for the water stock at the branch." The will provided further: "Peggy Sue [Nicely] is to have the right to use stock barn and Herbert [Nicely], Jr., a right to use the tobacco barn as long as they desire to share same, and a right to use water off of the Herbert [Nicely], Jr. tract for watering purposes." In 1992, Peggy Sue Nicely conveyed Tract 84.02 to Plaintiffs. Peggy Sue Nicely, now deceased, continued to live on Tract 84.[2] In 2016, Betty Lou Nicely conveyed Tract 84.01 to Defendant.

In September 2021, this matter was tried. Much of the evidence at trial pertained to the boundary line dispute, which is not at issue on appeal. As relevant to the issues on appeal, there was testimony about cattle drinking out of a branch—also called a stream—which was fed by the spring. Roger A. Collins, a Nicely cousin familiar with the land, testified in part as follows:

> Q. All right. After Herbert Sr. died, did Herbert Jr. continue to keep cattle on the property?
> A. Yeah.
> Q. And could the cattle drink from the branch?

[1] Ms. Nicely's first name is sometimes spelled "Myrtie" in the record.

[2] The Trial Court, in an exchange with Plaintiffs' counsel at trial, stated that Peggy Sue Nicely had died, to which Plaintiffs' counsel concurred.

> A. Yes.
> Q. All right. At any time did Peggy have any pipe or any way to get water from the spring or the branch to the property she owned above the railroad?
> A. No.
> Q. Was there a tobacco barn over there?
> A. Yeah, there was an old tobacco barn.
> Q. And a hay field?
> A. Yes.
> Q. Okay. But there was no pipe or anything from the spring?
> A. No.
> Q. Is that pretty steep in there? It's uphill from the spring to the hay field and the tobacco barn?
> A. Yes.
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> ***
>
> Q. You said that after Herbert Nicely Sr. died, Herbert Jr. continued to have cattle on the property. Is that correct?
> A. Yes, sir.
> Q. And those cattle could drink from the branch that the spring that we're talking about feeds.
> A. Right.
> Q. Right? And so there was nothing between the cattle on Herbert Nicely Jr.'s property and the branch to keep the cattle out of the branch. Is that correct?
> A. No.
> Q. What was between the cattle and the branch?
> A. There was -- the cattle could drink out of the branch.

Arthur Ray Nicely testified, as well. As for his history with the land, he testified as follows, in relevant part:

> See, Papaw died. But before he died, he divided it between Peggy and Herbert. He divided it. And they had deeds. And I leased Peggy's side. I growed tobacco on it and had stuff on it then. And then after that, me and Fuzz [Herbert] talked, we got together and I bought it. I bought Peggy's side. And then I farmed it. And I leased Fuzz -- Herbert's side, and I had cattle on all of it until back in -- a few years ago when I got to Boone, North Carolina, for my job and I sold my cattle. I got no cattle on it now.

In March 2022, the Trial Court entered its final judgment. The Trial Court accepted the opinion of Defendant's surveyor as to the correct boundary line, which placed the spring on Defendant's property. That decision by the Trial Court is not an issue on appeal. However, the Trial Court also ruled that Plaintiffs had an easement by implication to use water from the spring, "a result of the long term use by the Plaintiffs and their predecessors in title to the Spring." The Trial Court incorporated into its final judgment a transcript of its oral ruling. In its oral ruling, the Trial Court stated, as pertinent:

> I would go on and say this, that it is clear to me that -- and I note that in the counterclaim, that was filed this morning, by the way, "Therefore, the counter-plaintiff respectfully requests, pursuant to T.C.A. 29-14-102, that this Court determine and declare the location of the boundary between the parties' properties, particularly with respect to the spring at issue."
>
> So this spring is -- but it is clear to me that Herbert Sr. and Myrtie intended that Peggy Sue have rights to use the water from the spring. Why? Well, you've got that will, but that's not all you've got. You've got a gravity-fed water pipe running from the spring down to the house that belonged in the first place to Herbert Sr. and Myrtie, and that existed at the time this property was divided. That predated the division of the property when Herbert Sr. and Myrtie owned it all. So in the Court's opinion, that was an easement for use of the water by implication.
>
> And of course, Peggy Sue -- she got the whole tract. She got the whole tract, not just Tax Parcel -- Tax Map 37, I believe it is, Parcel 84, not just that, not just the small tract, 84, she got what is now 84.02, which is Arthur Ray Nicely's property today.
>
> So you put that together with the will, the existence of the fact that the Arthur Sr. [sic] and Myrtie tract were already using water from the well at the time the division was made, you put that together with the will, it's clear to me that Arthur Sr. and Myrtie intended that the Peggy Sue Nicely tract, that Arthur Ray was to have use of the water from the well, from the spring.
>
> Now, that perhaps does not answer all the questions just exactly. But it's clear to me that they meant for the Peggy Nicely tract -- and let's think in terms of not who owned the property but the tract of property. I go back to the point that Peggy Sue owned not just Tax Map Parcel 84.02, but she owned 84.02 and what's now denominated 84. She owned both of them at a time. In other words, the whole tract in her was one tract. And there was a water pipe -- and may still be, I guess, and there still is. There's a picture here of a water pipe going through the railroad culvert to get across to the south side of the railroad to the Peggy -- the Peggy Sue tract.
>
> And so once again, it's clear to me that Arthur Sr. and Myrtie intended that the Peggy Sue tract now -- at least part of what went to Peggy Sue, now

> owned by Arthur Ray, were to have rights to use water out of the spring. But I do find, I do find that the spring itself is located on the tract that -- by the preponderance of the evidence -- and to be sure, I've already said it, it's disputed, but by the preponderance of the evidence, it's located on the property that Jarrod Atkins now owns.
>
> What else can I do for you today?
>
> MR. BROWN [counsel for Defendant]: With your permission, Your Honor, I'll get together with Mr. Newman and we'll prepare an order.
>
> MR. NEWMAN [counsel for Plaintiffs]: Just to be clear, Your Honor, is that water rights?
>
> THE COURT: Pardon?
>
> MR. NEWMAN: The easement by implication for water rights. Did I understand the Court correctly?
>
> THE COURT: Sure.
>
> MR. NEWMAN: Okay.
>
> THE COURT: Sure. Not the ownership of the spring. And sometimes --
>
> MR. NEWMAN: The spring is located on the --
>
> THE COURT: In fee simple. And sometimes we mix up in our minds, you know, easement ownership and fee simple. Sometimes we mix those things up in our mind. But at least in the counterclaim, it was requested that the Court declare the parties -- the location of the boundary line and the parties' rights, and so that's what the Court has tried to do.
>
> Anything further?
>
> MR. BROWN: No, Your Honor. Thank you.

Defendant timely appealed to this Court.

Discussion

Although not stated exactly as such, Defendant raises the following issues on appeal: 1) whether the Trial Court erred in holding that Plaintiffs are entitled to use of water from Defendant's spring under an easement by implication; 2) alternatively, if prior use is established, whether the Trial Court erred in failing to make findings of fact concerning the necessity of the implied easement; and 3) alternatively, assuming an implied easement exists, whether the Trial Court erred in failing to strictly limit the scope and purpose of the easement to avoid materially increasing the burden on Defendant's property.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn.

2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

"'An easement is a right an owner has to some lawful use of the real property of another.'" *Cellco P'ship v. Shelby Cnty.*, 172 S.W.3d 574, 588 (Tenn. Ct. App. 2005) (quoting *Pevear v. Hunt*, 924 S.W.2d 114, 115 (Tenn. Ct. App. 1996)). This case involves an alleged easement by implication. In *Cellco P'ship*, we set out the elements of an easement by implication as follows:

> (1) A separation of the title; (2) Necessity that, before the separation takes place, the use which gives rise to the easement shall have been long established and obvious or manifest as to show that it was meant to be permanent; and (3) Necessity that the easement be essential to the beneficial enjoyment of the land granted or retained. Another essential is sometimes added to these—namely, that the servitude be continuous, as distinguished from temporary or occasional.

Cellco P'ship, 172 S.W.3d at 589 (quoting *Johnson v. Headrick*, 34 Tenn. App. 294, 237 S.W.2d 567, 570 (Tenn. Ct. App. 1948)). "Tennessee does not, however, require strict or absolute necessity; rather, an easement by implication should only arise where it is of such necessity that it must be presumed to have been within the contemplation of the parties." *Newman v. Woodard*, 288 S.W.3d 862, 866 (Tenn. Ct. App. 2008) (citations omitted). "Courts in Tennessee have interpreted the term 'necessity' as meaning 'reasonably necessary' for the enjoyment of the dominant tenement." *Fowler v. Wilbanks*, 48 S.W.3d 738, 741 (Tenn. Ct. App. 2000) (citations omitted). "[T]he elements of an easement by implication need only be proved by a preponderance of the evidence." *River Oaks, GP v. Bucse*, No. M2015-02208-COA-R3-CV, 2016 WL 6248024, at *7 (Tenn. Ct. App. Oct. 25, 2016), *no appl. perm. appeal filed* (citations omitted). The party seeking an easement by implication has the burden of proving all of the essential elements thereto. *Cellco P'ship*, 172 S.W.3d at 589 (citations omitted). "The law does not favor [easements by implication], and the courts of this state have expressed a policy in favor of restricting the use of the doctrine." *Id*. (citations omitted).

Defendant's first issue is whether the Trial Court erred in holding that Plaintiffs are entitled to use of water from Defendant's spring under an easement by implication. Tracking the elements of an easement by implication, Defendant argues, to wit: that Peggy Sue Nicely's 1992 conveyance of Tract 84.02 to Plaintiffs did not further divide title to Defendant's property and cannot create an additional implied easement for use of water from the spring; that any easement for use of water from the spring would have to stem from usage considered permanent by the 1979 original division of the Nicely farm; that

while a pipe from the spring provides residential water to Tract 84, Peggy Sue Nicely never used water from the spring to benefit Tract 84.02; that when Defendant purchased Tract 84.01 from Betty Lou Nicely in 2016, there was no permanent or apparent use of water from the spring to benefit Plaintiffs' property; and that there is a lack of necessity for an implied easement because there is no evidence of permanent or continuing use of spring water to benefit Plaintiffs' property before separation of title in 1979 or thereafter.

For their part, Plaintiffs assert multiple points in support of their contention that the Trial Court was correct in finding an implied easement, to wit: that a stream off of the spring serviced a water box on Defendant's property which cattle had access to along with the stream itself; that when Peggy Sue Nicely conveyed Tract 84.02 to Plaintiffs in 1992, she reserved for herself and H.E. Nicely, Jr. a right of way easement to obtain water from the spring;[3] that after Plaintiffs' acquisition of Tract 84.02 in 1992, they used the property for growing tobacco and keeping cattle for the next 30 years; that the stream was the only source of water for Plaintiffs' cattle; that H.E. Nicely, Sr.'s will reflected his desire that Peggy Sue Nicely have access to the spring; that Betty Lou Nicely testified that Peggy Sue Nicely helped farm the property she owned; and that Roger A. Collins testified that the cattle could drink from the spring and the branch.

This issue requires determining whether the elements of an easement by implication were proven, beginning with separation of title. The Nicely farm was divided in 1979. Defendant's property emerged out of this division. Peggy Sue Nicely's 1992 conveyance of Tract 84.02 to Plaintiffs, while she retained Tract 84, did nothing to further separate title of Defendant's property from that of Plaintiffs' property. Thus, any easement by implication for Plaintiffs to use Defendant's property is limited to uses considered permanent by 1979 and continued thereafter. Nevertheless, separation of title occurring in 1979 was proven.

The second and third elements are prior use and necessity. Plaintiffs' and Defendant's properties are rural in character and have been used for agriculture over the years. Cattle and tobacco were farmed. However, the specific question as to prior use is whether there was long-established and obvious or manifest use whereby Plaintiffs' property benefitted from the spring on Defendant's property. We find no such evidence. While Plaintiffs point to the pipe drawing water from the spring for use on Tract 84, we fail to see how this supports Plaintiffs' position as to their own property, Tract 84.02.

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[3] The 1992 warranty deed states, as relevant: "As further consideration for this conveyance the party of the first part reserves unto herself and H. E. Nicely, Jr., their heirs and assigns, a right of way easement to obtain water from spring as located and situated on the above property without any costs or expenses, they being responsible for maintaining of necessary means of obtaining said water, which easement shall run with the land."

Water has long been piped from the spring to provide residential water to Tract 84. That is uncontroverted. Nevertheless, Plaintiffs own Tract 84.02, not Tract 84. There is no comparable evidence of such permanent and obvious use of water from the spring by Tract 84.02. In short, Plaintiffs cannot prove prior use by their property, Tract 84.02, of the spring on tract 84.01 by pointing to prior use of the spring by the owner of a third property, Tract 84.[4] In addition, we note that the Trial Court relied in part on H.E. Nicely, Sr.'s will in reaching its decision. The Trial Court did not explain how the will satisfied any element necessary to sustain an implied easement. Respectfully, H.E. Nicely, Sr.'s will does not bear on whether Plaintiffs have a right to access Defendant's spring. Finally, the fact that Plaintiffs' and Defendant's properties were united until 1979 and were both used for various agricultural purposes is insufficient in itself to prove prior use to Defendant's spring for purposes of an implied easement. The record is lacking in evidence of an obvious, permanent, and long-established use of the spring by Tract 84.02 in 1979 or thereafter. We find that Plaintiffs have failed to prove prior use.

With respect to necessity, the third element of an easement by implication, there is nothing in the record to support a finding that drawing water from Defendant's spring is essential to Plaintiffs' beneficial enjoyment of their land. To be sure, it would be a nice benefit to Plaintiffs if they were able to use Defendant's spring, but it is hardly essential. While strict necessity is not required to establish an implied easement, that a certain use simply would be useful or advantageous is insufficient in itself to prove the element of necessity. Otherwise, anyone could prove the element of necessity for an implied easement merely by showing that it would be useful to them to use their neighbor's property for some purpose. Easements by implication generally are disfavored in Tennessee. To justify the use of another's property by means of an easement by implication, necessity requires more than that the use would be a nice added benefit. As it happens, Plaintiffs herein do not require access to Defendant's spring to raise cattle, which is their primary stated reason for seeking an easement. Should Plaintiffs wish to raise cattle on their property, they can use the branch that runs through their property. They do not need to use Defendant's spring to raise cattle. In fact, allowing cattle to drink directly out of the spring would result in the spring water being contaminated. Counsel for Plaintiffs properly acknowledged as much at oral arguments. In sum, Plaintiffs failed to prove two of the three elements necessary to establish an easement by implication, prior use and necessity. The evidence preponderates against the Trial Court's factual findings. We reverse the Trial Court's finding of an easement by implication. Defendant's remaining issues are pretermitted.

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[4] Whether the owner of Tract 84 has an easement, implied or otherwise, to continue drawing residential water from Defendant's spring is not before us.

Conclusion

The judgment of the Trial Court is reversed to the extent that it found an easement by implication, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellees, Arthur Ray Nicely and Henrietta Nicely.

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D. MICHAEL SWINEY, CHIEF JUDGE