

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
October 5, 2004 Session

**CUMULUS BROADCASTING, INC. ET AL. v. JAY W. SHIM ET AL.**

**Appeal from the Chancery Court for Davidson County  
No. 01-3248-III Ellen Hobbs Lyle, Chancellor**

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**No. M2003-02593-COA-R3-CV - Filed December 15, 2005**

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This appeal involves a dispute between a broadcasting company and a neighboring property owner regarding the access road to the company's tower and transmitter. The neighbor destroyed a portion of the access road after a survey revealed that the road ran beyond the boundary of the right of way. Thereafter, the broadcasting company filed suit in the Chancery Court for Davidson County requesting a declaration that it owned the access road and an injunction to prevent its neighbor from blocking the road. The trial court, granting the broadcasting company's summary judgment motion, concluded that the company had acquired the disputed portion of the access road through adverse possession. The neighboring property owner takes issue on this appeal with one of the trial court's evidentiary rulings and with the factual foundation of the trial court's decision. We have determined that the neighboring property owner was entitled as a matter of law to a dismissal of the broadcasting company's complaint because it was barred by Tenn. Code Ann. § 28-2-110(a) (2000).

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

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

James C. Hofstetter, Nashville, Tennessee, for the appellant, Jay W. Shim.

Douglas R. Pierce and Jeremy W. Parham, Nashville, Tennessee, for the appellees, Cumulus Broadcasting, Inc. and Phoenix of Hendersonville, Inc.

**OPINION**

**I.**

This case involves three tracts of real property in Goodlettsville, Tennessee that were once part of a single tract owned by James and Mildred Charlton. The outside boundaries of these tracts (the Cumulus tract, the Shim tract, and the Johnson tract) form a triangle with the Johnson tract on

the bottom left and the Shim tract on the bottom right. Both of these tracts front Campbell Road. The Cumulus tract is at the top of the pyramid and does not front Campbell Road.

In December 1966, the Charltons conveyed both the Johnson tract and the Cumulus tract to Lawrence and Elizabeth Johnson as a single tract. In February 1967, they conveyed the Shim tract to Charles and Francis James. Three years later, in August 1970, the Johnsons conveyed 5.2 acres of their property – the Cumulus tract – to Hendersonville Broadcasting Corporation (Hendersonville Broadcasting). Because this tract was landlocked, this conveyance included a 20-foot wide strip of property connecting the Cumulus tract with Campbell Road to be used as an access road.

Hendersonville Broadcasting began operating radio station WQQK in 1971. The station's tower and transmitter were located on the Cumulus tract, and in 1974, the station constructed an access road on the 20-foot strip of property for use by the radio station's engineers when they serviced the transmitter and tower. In June 1982, Hendersonville Broadcasting sold WQQK to Phoenix of Hendersonville, Inc. (Phoenix). The transaction included conveying the Cumulus tract to Phoenix. While the deed purported to convey the same 5.2-acre tract that Hendersonville Broadcasting acquired from the Johnsons, the legal description of the property differed slightly. As a result of this difference, the location of the 20-foot strip on the 1982 deed to Phoenix slightly overlapped the boundary of the Shim tract.

WQQK's engineers continued to use the access road on a regular basis to maintain the tower and transmitter. Jay W. Shim purchased the Shim tract in 1994. Three years later, in 1997, Dickey Brothers Broadcasting Company, LLC (Dickey Brothers) acquired Phoenix and continued to operate it and WQQK as a subsidiary. Mr. Shim had not surveyed his property when he purchased it in 1994. However, he commissioned a survey in November 2000 that revealed that a small portion of the access road, approximately 2,000 square feet, was on his property. Sometime later, Mr. Shim, without consulting with Dickey Brothers, removed part of an old livestock fence that ran along the road, bulldozed the portion of the access road he believed to be on his property, and built a fence across another part of the road.

In October 2001, Dickey Brothers filed suit in the Chancery Court for Davidson County seeking to enjoin Mr. Shim from blocking the access road. The court entered an agreed order temporarily enjoining Mr. Shim from obstructing the access road. In November 2001, Mr. Shim filed an answer asserting that he owned the disputed property. Thereafter, Dickey Brothers amended its complaint seeking to quiet title or in the alternative to declare that it owned the disputed property by adverse possession. Dickey Brothers also sought damages for trespass and a permanent injunction against further obstructions of the access road.<sup>1</sup> In his response to the amended complaint, Mr. Shim asserted that Dickey Brothers's claims were barred by Tenn. Code Ann. § 28-2-110 (2000).

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<sup>1</sup>In later pleadings, both Dickey Brothers and Mr. Shim asserted additional claims against other parties. We have omitted mention of these claims because they are irrelevant to the issues raised on this appeal.

In April 2003, Dickey Brothers moved for a summary judgment on its claim to establish its boundary line with the Shim tract. In May 2003, after Cumulus Broadcasting, Inc. purchased Phoenix of Hendersonville and WQQK from Dickey Brothers, Dickey Brothers requested the trial court to substitute Cumulus Broadcasting in its place as the plaintiff. In his response to the summary judgment motion, Mr. Shim again asserted that Cumulus's claim was barred by Tenn. Code Ann. § 28-2-110 and requested the trial court to grant him a summary judgment on that ground.

On June 23, 2003, the trial court filed an order replacing Dickey Brothers with Cumulus Broadcasting.<sup>2</sup> The court, relying on *Winborn v. Alexander*, 39 Tenn. App. 1, 279 S.W.2d 718 (1954), also concluded that Cumulus's claim was not barred by Tenn. Code Ann. § 28-2-110. Accordingly, the court determined that the undisputed facts proved that the prior owners of the Cumulus tract had "openly, actually, continuously, exclusively, adversely and notoriously used the property in question from 1976 to 2001" and, therefore, that "[t]hat use establishes, as a matter of law, the plaintiff's ownership of the property by adverse possession." The parties thereafter dismissed their remaining claims, and the trial court entered a final judgment on July 17, 2003.

On July 28, 2003, Mr. Shim filed a Tenn. R. Civ. P. 59.04 motion asserting that the affidavits supporting the summary judgment motion failed to prove that the road was used between 1980 and 1982 and, therefore, that Phoenix had to prove that it and its successors in interest had used the road continuously for twenty years. He also renewed his argument that Tenn. Code Ann. § 28-2-110 barred the complaint and argued that the trial court should have granted him a summary judgment based on the statute. The trial court denied this motion on September 10, 2003, and Mr. Shim perfected this appeal.

## II.

### MR. SHIM'S DEFENSE BASED ON TENN. CODE ANN. § 28-2-110(a)

The pivotal issue in this case involves the application of Tenn. Code Ann. § 28-2-110(a). Mr. Shim insists that the trial court erred by failing to dismiss Cumulus's complaint because he proved that Cumulus and its predecessors in title have not paid taxes on the disputed property for twenty years. While Cumulus concedes that its predecessors in title have not paid taxes on the disputed property, it asserts that Tenn. Code Ann. § 28-2-110 does not require the dismissal of its complaint because its predecessors in title paid taxes on the 5.2-acre Cumulus tract for more than twenty years. We have determined that Cumulus's concession that its predecessors in title did not pay taxes on the disputed tract for twenty years is fatal to its complaint.

Tenn. Code Ann. § 28-2-110 was enacted in 1947<sup>3</sup> to facilitate the collection of property taxes. It places the burden on persons claiming a taxable interest in real property to have their

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<sup>2</sup>Because the trial court replaced Dickey Brothers with Cumulus Broadcasting, we dropped Dickey Brothers as a named party on this appeal in accordance with Tenn. R. App. P. 19(e). We have also amended the style of this case to reflect that Cumulus Broadcasting, rather than Dickey Brothers, is the appellee.

<sup>3</sup>Act of Feb. 19, 1947, ch. 28, § 3, 1947 Tenn. Pub. Acts 179, 180.

interest assessed and to pay the taxes thereon. *Burress v. Woodward*, 665 S.W.2d 707, 709 (Tenn. 1984). Tenn. Code Ann. § 28-2-110(a)<sup>4</sup> acts as an absolute bar to suits by plaintiffs who cannot demonstrate that they or their predecessors in title have paid taxes on the property interest they claim for at least twenty years. *Alexander v. Patrick*, 656 S.W.2d 376, 377 (Tenn. Ct. App. 1983); *Bone v. Loggins*, 652 S.W.2d 758, 761 (Tenn. Ct. App. 1982). It does not, however, affect title or destroy rights,<sup>5</sup> require the ejection of the occupier or possessor of the property,<sup>6</sup> or prevent the owner or occupier of the property from defending their title and possession.<sup>7</sup>

Over the years, parties have attempted to avoid the application of Tenn. Code Ann. § 28-2-110(a) by limiting it to only certain types of claims. However, the courts have applied the statute to a broad variety of actions involving interests in real property. It is now beyond reasoned argument that Tenn. Code Ann. § 28-2-110(a) applies to actions to quiet title, *Lee v. Harrison*, 196 Tenn. 603, 614-16, 270 S.W.2d 173, 177-78 (1954); *Smith v. Puckett*, No. 87-291-II, 1988 WL 23918, at \*1 (Tenn. Ct. App. Mar. 18, 1988) (No Tenn. R. App. P. 11 application filed); *Tidwell v. Van Deventer*, 686 S.W.2d 899, 902-03 (Tenn. Ct. App. 1984), and to boundary line disputes. *Alexander v. Patrick*, 656 S.W.2d at 377; *Jack v. Dillehay*, No. M2004-00192-COA-R3-CV, 2005 WL 2805569, at \*1, 6 (Tenn. Ct. App. Oct. 26, 2005); *Landworks, Inc. v. Vick*, No. E2001-00615-COA-R3-CV, 2002 WL 236690, at \*7-8 (Tenn. Ct. App. Feb. 19, 2002) (No Tenn. R. App. P. 11 application filed).

The courts have recognized that the strict application of Tenn. Code Ann. § 28-2-110(a) can produce harsh results. *Burress v. Woodward*, 665 S.W.2d at 709. Accordingly, they place the burden of demonstrating the applicability of Tenn. Code Ann. § 28-2-110(a) on the party seeking the dismissal of the suit. To carry this burden, the party seeking to invoke Tenn. Code Ann. § 28-2-110(a) must prove “clearly” or “conclusively” that the person claiming the interest in property or the person’s predecessors in interest failed to pay taxes on the property for twenty years. *Bone v. Loggins*, 652 S.W.2d at 761. The most frequent basis for declining to invoke Tenn. Code Ann. § 28-2-110(a) is the defendant’s failure to prove that the plaintiff failed to pay the required taxes for at least twenty years. See, e.g., *Smith v. Puckett*, 1988 WL 23918, at \*2; *Bone v. Loggins*, 652 S.W.2d at 760-61.

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<sup>4</sup>Tenn. Code Ann. § 28-2-110(a) provides:

Any person having any claim to real estate or land of any kind, or to any legal or equitable interest therein, the same having been subject to assessment for state and county taxes, who and those through whom such person claims have failed to have the same assessed and to pay any state and county taxes thereon for a period of more than twenty (20) years, shall be forever barred from bringing any action in law or in equity to recover the same, or to recover any rents or profits therefrom in any of the courts of this state.

<sup>5</sup>*Burress v. Woodward*, 665 S.W.2d at 709; *Cooke v. Smith*, 721 S.W.2d 251, 254 (Tenn. Ct. App. 1986).

<sup>6</sup>*Layne v. Bagginstoss*, 640 S.W.2d 1, 3 (Tenn. Ct. App. 1982).

<sup>7</sup>*Burress v. Woodward*, 665 S.W.2d at 709.

Notwithstanding the parties' agreement that neither Dickey Brothers nor any of its predecessors in interest had ever paid taxes on the disputed property,<sup>8</sup> the trial court determined that this court's decision in *Winborn v. Alexander*, supplied a basis for declining to apply Tenn. Code Ann. § 28-2-110(a). The court interpreted the holding of *Winborn v. Alexander* to be "that failure to pay taxes is not a bar to claiming real estate if the disputed portion is believed or considered to be a part of a main parcel of land on which taxes are being paid and the dispute does not pertain to a separate parcel." The trial court's interpretation of *Winborn v. Alexander* is incorrect.

Tenn. Code Ann. § 28-2-110(a) clearly provides that the taxes that must be paid in order to avoid the application of the statute are the taxes on the property claimed by the person filing the suit. Thus, the courts have consistently held that the taxes must be paid on the disputed property. *See, e.g., Alexander v. Patrick*, 656 S.W.2d at 377; *Bone v. Loggins*, 652 S.W.2d at 761; *Jack v. Dillehay*, 2005 WL 2805569, at \*8; *Landworks, Inc. v. Vick*, 2002 WL 236690, at \*8. While *Winborn v. Alexander* involved a small strip of land contiguous to property on which the claimants had paid taxes for many years, the court deciding the case did not create some sort of "contiguous property exception" to the operation of Tenn. Code Ann. § 28-2-110(a). Rather, the decision simply reflects the court's conclusion that the defendants failed to prove that the plaintiffs had failed to pay taxes on the disputed property. *Winborn v. Alexander*, 39 Tenn. App. at 25, 279 S.W.2d at 729 (noting that "this Section [Tenn. Code Ann. § 28-2-110(a)] does not apply to the case at Bar because it does not appear that complainants failed to pay any taxes on their<sup>9</sup> property. . .").

Another section of this court has recently construed Tenn. Code Ann. § 28-2-110(a) in a case factually akin to this one. *Trull v. Ridgeway*, No. W2004-02026-COA-R3-CV, 2005 WL 1307855 (Tenn. Ct. App. May 27, 2005) (No Tenn. R. App. P. 11 application filed). The Trulls filed a complaint seeking to establish ownership of a parcel of real property by adverse possession. The Ridgeways answered contending they owned the property by virtue of a deed conveying them the property in fee simple. They also asserted that they had been paying taxes on the disputed property and, therefore, that the Trulls' complaint was barred by Tenn. Code Ann. § 28-2-110(a). The trial court dismissed the Trulls' complaint after their lawyer admitted in open court that the Trulls had not paid taxes on the disputed property for twenty years. This court affirmed the dismissal of the Trulls' complaint, noting that Tenn. Code Ann. § 28-2-110(a) "clearly states that parties have no standing to bring 'any action in law or in equity . . . to recover [property that is subject to state or

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<sup>8</sup>Dickey Brothers admitted in its responses to Mr. Shim's second request for admissions and interrogatories and his additional statement of material facts that it was undisputed that the "[p]laintiffs and their predecessor in title have never paid any of the real property taxes assessed against the real property . . . presently owned by defendant, Jay W. Shim." Dickey Brothers also agreed that it was undisputed that "[t]he overlap area shown on the survey of Wendell H. Talley, Sr., dated March 14, 2002 is being – and has since prior to 1970 been – assessed as part of the 4.8 acre tract presently owned by defendant, Jay W. Shim."

<sup>9</sup>This court had already determined earlier in the opinion that the complainants owned the disputed property based on an earlier informal agreement between the complainants and their neighbor. *Winborn v. Alexander*, 39 Tenn. App. at 21-22, 279 S.W.2d at 727.

county property taxes]’ if that party has not paid taxes” on the tract in question. *Trull v. Ridgeway*, 2005 WL 1307855, at \*2.

Cumulus has conceded that none of its predecessors in title paid taxes on the disputed sliver of real property at issue in this case. This concession left the trial court with no legally acceptable alternative other than to dismiss the complaint on the ground that it was barred by Tenn. Code Ann. § 28-2-110(a). As harsh as the result may be, the failure of the predecessors in title of the Cumulus tract to pay taxes on the disputed property undermined the complaint.

### III.

#### MR. SHIM’S ENTITLEMENT TO A SUMMARY JUDGMENT

Mr. Shim asserted his Tenn. Code Ann. § 28-2-110(a) defense early in this litigation and repeatedly requested the trial court to grant him a summary judgment based on the statute. The trial court declined to grant Mr. Shim a summary judgment solely because it concluded that Tenn. Code Ann. § 28-2-110(a) was inapplicable to this case. Our determination that the trial court erred with regard to the applicability of Tenn. Code Ann. § 28-2-110(a) reopens the question of whether Mr. Shim is entitled to a summary judgment even though he was the non-moving party in the trial court.

Trial courts may grant summary judgments to non-moving parties; however, they must exercise this power with meticulous care. *Thomas v. Transp. Ins. Co.*, 532 S.W.2d 263, 266 (Tenn. 1976). Such decisions should be made only when the trial court is satisfied that the party opposing the summary judgment has been given notice and has been given a reasonable opportunity to respond to all the issues being considered by the court. *March Group, Inc. v. Bellar*, 908 S.W.2d 956, 959 (Tenn. Ct. App. 1995).

Cumulus and Dickey Brothers had adequate notice that Mr. Shim was relying on Tenn. Code Ann. § 28-2-110(a). Therefore, they had a full and fair opportunity to present evidence and legal arguments to oppose his assertion that the complaint should be dismissed because Dickey Brothers and its predecessors in title had not paid taxes on the disputed property. In fact, both parties presented evidence and extensive legal arguments on this issue. Accordingly, the trial court would have been justified in entering a summary judgment for Mr. Shim and, no doubt, would have done so had it not misapplied Tenn. Code Ann. § 28-2-110(a).

### IV.

In light of our decision that Mr. Shim’s defense based on Tenn. Code Ann. § 28-2-110(a) is well-taken, we need not address the remaining issues Mr. Shim raised in his brief.<sup>10</sup> The final

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<sup>10</sup>Were we to address the issues regarding the trial court’s consideration of the supplemental affidavits and the evidentiary foundation of its decision, we would find that the trial court did not err by considering the supplemental affidavits and that the undisputed evidence supports that trial court’s conclusion that Cumulus was entitled to a judgment on its adverse possession claim as a matter of law.

judgment entered in this case on June 26, 2003 is reversed and the case is remanded to the trial court with directions to enter an order dismissing the amended complaint on the ground that it is barred by Tenn. Code Ann. § 28-2-110(a). The costs of this appeal are taxed to Cumulus Broadcasting, Inc. for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.