

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 19, 2007 Session

**FRANK BAILEY and wife, ALMA SUE BAILEY; EARL BAILEY; CALVIN
CHESNEY; and RALPH BAILEY, v. CARROLL S. GWYN and wife, ROSE
F. GWYN**

**Direct Appeal from the Chancery Court for Union County
No. 3963 Hon. Billy Joe White, Chancellor**

No. E2006-01461-COA-R3-CV - FILED AUGUST 24, 2007

In this action to have an easement established across defendants' property, the Trial Court held there was clear and convincing evidence that plaintiffs were entitled to an easement by adverse use. We affirm.

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

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

B.J. Reed, Knoxville, Tennessee, for appellants.

Robert M. Estep, Tazewell, Tennessee, for appellees.

OPINION

In this action, plaintiffs sought a declaration to establish a right of way/easement over defendants' property. They alleged that they had owned certain property in Union County for more than 30 years and that a right of way existed across defendants' adjoining property as a means to access plaintiffs' property. Also, their predecessors had used the right of way for more than thirty years. They further averred that defendants had recently blocked their access by constructing a building and placing other obstacles in the right of way, and this right of way road was shown in detail on a TVA map dated 1958, which was also shown in an aerial photo in the County Extension

Office.

Defendants in their Answer, denied the allegations of the Complaint, and asserted affirmative defenses of warranty deed warranting no easements or right of ways, lack of necessity, and non-use of the alleged easement.

As a preliminary matter, the Trial Court ruled TVA was a necessary party, and that it owns the property below the 1040 contour line, and that the right of way would have to cross TVA property as well as defendants' property. The Court later entered an Order to Proceed with Case, which stated that plaintiffs had submitted a letter from TVA, stating TVA had agreed to the establishment of a right of way across TVA property from Black Fox Road to defendants' property. The Order attached the letter and map.

At the beginning of the trial, the parties stipulated to the admission of various exhibits, including the county tax map, the letter from TVA with attached map, and various deeds dealing with the subject properties, as well as the 1958 TVA map.

At the conclusion of the evidentiary hearing, the Court rendered a Memorandum Opinion, and stated that the road was there, at least twelve feet wide, and that both surveyors had so found. The Court found that the road had been there for eighty years or more, and had been used by the people who needed to use it. The Court observed that the use had not been heavy, especially in winter, and that it had not been as frequently used in more recent years as it had been in the 1960's, but there had been consistent use for more than forty years. The Court held that necessity had not been proven, but there was a 12 foot right of way established by adverse possession. The Court stated that if the parties could agree, defendant could erect a gate across the right of way and give keys to plaintiffs.

The Court entered a Judgment, finding that defendants' property was "burdened by a right of way easement, twelve (12) feet in width, which benefits the properties of the Plaintiffs." The Court established the right of way as shown on the survey of Perry Walker.

On appeal, defendants argue that plaintiffs did not establish the right to use a right of way across the property by clear and convincing evidence. Defendants argue that the proof did not show continuous, open, visible, and exclusive use of the property, "except perhaps testimony of use at a time when the property was owned [by TVA]".

As we have previously held:

To establish a prescriptive easement, a party must prove by clear and convincing evidence that he has used the easement for at least twenty years, and that such use is "adverse, under claim of right, continuous, uninterrupted, open, visible, exclusive, and with the knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period, and while the owner of the servient

tenement is under no legal disability to assert his right or to make a grant."

Stone v. Brickey, 70 S.W.3d 82, 86 (Tenn. Ct. App. 2001), quoting *House v. Close*, 346 S.W.2d 445, 447 (Tenn. Ct. App. 1961). Further, the claimant can rely on his own adverse use as well as the adverse use of his predecessors in title (which is called "tacking") in order to satisfy the prescriptive period. See *Derryberry v. Ledford*, 506 S.W.2d 152 (Tenn. Ct. App. 1973). The rule of legal privity required for such "tacking" is satisfied by the parent/child relationship, as well as by the reliance of the grantee on the grantor's representations regarding ownership. See *Thompson v. Hulse*, 2000 WL 124787 (Tenn. Ct. App. Jan. 26, 2000).

In this case, the evidence established that the Baileys had used the road for more than forty years, and that they used same under claim of right, believing they had a deeded easement. Their use was adverse to defendants and their predecessors, and was continuous and uninterrupted, although not as frequent in recent years. It was open, visible, and exclusive, and it was shown that the presence of the road was clearly visible to both surveyors, and was visible and known to defendants when they bought the property. While defendants at some point objected to the use, after acquiring the property in 1987, the evidence established that no prior owners of that property had ever objected to the plaintiffs' or their predecessors use of the road. It is also clear that TVA (a predecessor to Gwyn) knew of the existence of the road, as it is depicted on the 1958 map. The evidence does not preponderate against the Trial Court's finding that plaintiffs had proven an easement by prescription by clear and convincing proof.

Defendants assert that plaintiffs testified that their use had been diminished in recent years since defendants owned the property because there was a gate placed across the right of way. Essentially, defendants are asserting that the easement had been abandoned, but as this Court has explained:

"The primary elements of abandonment are the intention to abandon and the external act by which the intention is carried into effect. The intention to abandon is considered the first and paramount inquiry. Abandonment may arise from a single act or from a series of acts. Time is not an essential element of abandonment, and is of no importance except as indicative of intention." 1 Am.Jur. P. 6 and 7 Sec. 8.

The Supreme Court of this state speaking on this question said: "Indeed, in order to justify the conclusion that there has been an abandonment, there must be some clear and unmistakable affirmative act indicating a purpose to repudiate the ownership. This was the substance of the decision of the court upon this point in *Woods v. Bonner*, 89 Tenn. 411, 414, 415, 18 S.W. 67. ***" *Phy v. Hatfield*, 122 Tenn. 694, 126 S.W. 105, 135 Am.St.Rep. 888, 19 Ann.Cas. 374.

And it has been repeatedly held that a mere nonuser will not amount to abandonment of an easement, but that there must be some positive showing of an intention to abandon. *Boyd v.*

Smelcer v. Rippetoe, 147 S.W.2d 109, 113-114 (Tenn. Ct. App. 1940).

“Mere nonuser of an easement does not raise a presumption of abandonment, especially where it is not continuous for the time required for the perfection of an easement by prescription.” *Cottrell v. Daniel*, 205 S.W.2d 973 (Tenn. Ct. App. 1947). Thus, while plaintiffs’ use of the easement has declined in recent years, the evidence does not establish abandonment of the easement. Moreover, it is clear that temporary obstructions, even in the form of a fence, across the easement will not serve to establish intent to abandon the easement. *Id.* The landowner’s placement of obstacles in the easement will not serve to interrupt the continuous use of the easement once the prescriptive period has been satisfied. *Tucker v. Hall*, 1986 WL 7853 (Tenn. Ct. App. July 15, 1986).

For the foregoing reason, we affirm the Trial Court’s Judgment finding a prescriptive easement in plaintiffs’ favor.

The cause is remanded with the cost of the appeal assessed to Carroll and Rose Gwyn.

HERSCHEL PICKENS FRANKS, P.J.