IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 19, 2008

BRUCE WAYNE FERGUSON v. DARRYL SHARP,[1] ET AL.

Appeal from the Chancery Court for Campbell County
No. 05-123 Billy Joe White, Chancellor

No. E2007-01178-COA-R3-CV - FILED JUNE 30, 2008

Bruce Wayne Ferguson ("the Plaintiff") filed this lawsuit after Darryl and Denise Sharp ("the Defendants") installed a gate on a right-of-way over their land that the Plaintiff utilized to reach his property. The Defendants claimed the gate was necessary for their safe use and enjoyment of their land because the right-of-way area was being subjected to trespassing, vandalism, and theft. The trial court agreed with the Plaintiff that the gate was not necessary and permanently enjoined the Defendants from maintaining it on the right-of-way. The Defendants appeal the judgment of the trial court. We affirm.

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

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J. and SHARON G. LEE, J., joined.

C. Mark Troutman, LaFollette, Tennessee, for the appellants Darryl Sharp and Denise Sharp.

Curtis W. Isabell, Clinton, Tennessee, for the appellee, Bruce Wayne Ferguson.

OPINION

The parties own adjacent tracts of property in Campbell County. The common boundary line between the parties is the Plaintiff's northeast line and the Defendants' southwest line.

The Plaintiff's property, consisting of about 80 acres, has been in his family for over 89 years. Because the Plaintiff's land lacks access to the public road, the Plaintiff and his predecessors in interest have utilized the easement at issue across what is now the Defendants' property for over 50 years. The Plaintiff uses the roadway to gain access to his property for

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1 The actual first name of Mr. Sharp, now deceased, was "Darrell."

recreational purposes such as family reunions, hunting, and camping. He testified that he has made improvements to the road, such as grating and graveling it, when needed:

> Q: Well, how often would you work and gravel that road?
>
> A: Well, just whenever it washed out. When the ruts got deep, we'd just fix it . . . .

The Defendants purchased their property by warranty deed dated May 1, 2000. The land was owned previously by members of the Hatmaker family. It eventually came into the possession of Lonnie Hatmaker, dba LaFollette Enterprises L.P. Mr. Hatmaker, 68 years old at the time of trial, testified that he had known the Ferguson family his whole life, as the Hatmaker family had owned a tract of property adjoining the Plaintiff's property for the Plaintiff's entire life. Mr. Hatmaker testified that the Ferguson family had used the roadway through his family's property to access the Plaintiff's property for as far back as he could remember. Mr. Hatmaker stated that this was the only access the Ferguson family had to the 80 acres. He noted that prior to the ownership of LaFollette Enterprises, his brother put up a cattle gate across the easement road. However, when Mr. Hatmaker acquired the property, the gate was removed. Mr. Hatmaker testified that he owned the property for more than 20 years prior to conveying it to the Defendants. During that time period, the easement was not gated.

Mr. Hatmaker further testified that prior to the sale of the property to the Defendants, Mr. Sharp obtained personal knowledge of the Plaintiff's easement because, before the sale became final, the survey and the easement were fully explained to Mr. Sharp by Mr. Hatmaker's business partner, David Rogers. Mr. Hatmaker stated as follows:

> A: Now, when I made this deed, right here is the deed as a whole. We -- this is a copy of the survey --
>
> Q: Very well.
>
> A: -- then -- which was made part of this deed that was the -- the roadway easement, that was part of the deed when it left my office. This was all one deed.
>
> Q: Okay. Well, let me -- just for the purpose of the record, your testimony is, if I'm understanding it correctly, what left your office and went to Mr. and Ms. Sharp was what has been filed as Exhibit 2 and also what has been filed as Exhibit 4 and that is the roadway easement?
>
> A: Yes, that's what left my office.
> Q: Okay. Now, you've -- you've given us a copy of what left your office, is that correct?
>
> A: Right, that's the copy filed here.

Q: And that includes Exhibit 4 called conveyance of a roadway easement, --

A: Yes, sir.

* * *

Q: So, Mr. Hatmaker, is there any question in your mind that Mr. and Ms. Sharp had notice of the conveyance of the roadway easement based on the fact that you gave them the document?

A: No. Mr. -- Mr. Rogers went over -- I was there. He went over it thorougly.

Q: Okay. Now --

A: I don't remember Ms. Sharp being there, but Darryl was there, Mr. Sharp was there. He was the one that brought the check by and paid us and picked the deed up.

The Defendants testified that after they purchased their property, they improved the roadway, erected storage buildings, constructed a large lake on the property, and cleared various fields. They contended that they encountered problems with trespassers on the property, with off-road vehicles frequenting their land. They claimed that thefts and vandalism have occurred at various times, and that trash is frequently strewn across the property. Mrs. Sharp noted as follows:

A: Yes. There's been four-wheelers that have spun circles and donuts in our field and did damage, run over some of the ornamental grass that we had planted. We've had some garbage threw out. There was somebody had came through while our gate had been left open at one time and dumped an old freezer and some boxes over one of the banks, a big like a chest-type deep freeze. And we've had some batteries stole out of our dozer, the two big batteries that run it. Logging chains have turned up missing that we had laying by our building. There's been numerous things that have been destroyed.

According to the Defendants, in an effort to curb the theft and vandalism and to secure their property, they installed the gate across the easement in 2001 or 2002. Initially, the Defendants provided a key to the lock on the gate so that the Plaintiff could have access to the easement and his property. Even so, Mr. Ferguson testified as follows regarding the gate:

A: [W]e would be back there having a family picnic and of course I had to open the gate to get in, I'm the only one that's got a key, and then when my guests would come and go, when they'd get up there, that particular time [Mr. Sharp] was mowing, I would say that he would go behind me that one day probably four or five different times and lock that gate, knowing that we were there having a picnic coming and going. And I just thought this is ridiculous.

At some point, the Defendants had an attorney prepare a permissive easement agreement. The Plaintiff, however, refused to sign it, stating that he had been granted an easement by deed from LaFollette Enterprises and Mr. Hatmaker prior to the sale of the property at issue to the Defendants. While the Plaintiff had indeed acquired a roadway easement by deed from LaFollette Enterprises on January 26, 1999, he did not register it with the Campbell County Register of Deeds until July 31, 2001. According to the Plaintiff, after his refusal to sign the agreement, the Defendants changed the lock on the gate and refused to allow him access to his property for over three months.

The Plaintiff filed a complaint for interference with an easement, to establish boundary lines, and for a temporary restraining order ("TRO") to keep the Defendants from obstructing or in any manner interfering with the Plaintiff's easement pending a final determination of the action. The trial court issued the TRO on June 30, 2005. It was served upon the Defendants by the Campbell County Sheriff's Department on July 1, 2005. According to the Plaintiff, however, he continued to have problems with the Defendants locking the gate and denying him access or generally harassing him in regard to the gate. The Plaintiff's daughter-in-law testified that the Defendants' son cursed her when she requested that he unlock the gate for her.

In July 2005, the Plaintiff filed a motion asking the trial court to find the Defendants in contempt of court. Prior to the hearing on the motion, the Defendants returned the old lock to the gate, to which the Plaintiff had the key. Despite regaining access to his property, the Plaintiff filed an amended complaint and another TRO was subsequently issued.

In their answer and counterclaim, the Defendants alleged that the Plaintiff's property has direct access to a public road via an alternative route. They asserted that the gate is merely an inconvenience for the Plaintiff. According to the Defendants, the Plaintiff simply chose to not improve and maintain the alternative driveway and would rather utilize the driveway across the property of the Defendants.

In his response, the Plaintiff described the alternative access as a "pig path," claiming this road into his property is nothing more than a trail requiring the use of a four wheeler or some other four-wheel drive vehicle. The Plaintiff testified that it would require him to cross the properties of several other people in order to access his property by that path.

The Defendants further claimed that any recorded rights in and to the driveway across their property that were registered after the deed to their property was filed are unenforceable against them. They argued that a title examination prior to their purchase of the property had

revealed no easement, no right of way, and no other interest in favor of the Plaintiff in the subject property. The Defendants additionally raised the issues of the alleged trespass, theft, vandalism, and trash dumping upon their property. They also argued that the trial court erred in ordering the removal of the gate because gates existed across the easement during the prescriptive period and that the Plaintiff, therefore, was not entitled to the removal of the gate. Accordingly, they alleged that they are entitled to damages.

A hearing was held on August 8, 2006. The trial court held as follows:

> It's the opinion of this Court that the plaintiff herein has a prescriptive easement and has for a period of time in excess of 50 years over the roadway in question. It's further my opinion that the plaintiff has an easement by grant from the LaFollette Land Company, or Mr. Hatmaker's company, that that -- that the defendant had knowledge of that prior to the purchase of his property and that the interference of this right-of-way was illegal and uncalled for, that the defendant has no right to gate this right-of-way, it is an easement of open -- of the open road wherein is located on his survey. I think the plaintiff is entitled as damages to sanctions for -- in the form of the cost of bringing -- having to bring this suit. If there's any depositions, court reporter fees, attorney fees, they will be submitted to me for a finding of an exact amount. And the costs are taxed to the defendant. . . .

In the judgment filed on September 28, 2006, the trial court reiterated its prior holding:

> This matter came for hearing this the 8th day of August, 2006 before the Honorable Billy Joe White, upon the original pleadings filed in the case, the testimony of the parties and witnesses, the exhibits thereto, and the record as a whole, from all which the Court finds that the plaintiff herein has a prescriptive easement over the roadway in question by virtue of uninterrupted use either by him or by his predecessors in title for in excess of fifty years. The Court finds that this use was adverse, under claim of right, continuous, uninterrupted, open, visible, exclusive, and with knowledge and acquiescence of the owners of the servient tract.
>
> The Court further finds that the plaintiff has an easement by virtue of a grant from LaFollette Enterprises, L.P. to the plaintiff and identified at trial as Exhibit 4 and that the defendant Darryl Sharp had knowledge of this conveyance prior to the purchase of his property through which the roadway runs and that the interference of this right of way was illegal and uncalled for and the defendant had no right to gate the open road shown in the survey that is a part of the defendants' deed (Ex 2).

> The Court further finds that the plaintiff is entitled as damages to sanctions in the form of costs incurred for bringing this suit including deposition costs, court reporter fees and attorney fees all of which shall be submitted to the Court for a finding of an exact amount.
>
> Costs of this cause shall be taxed to the defendants.
>
> It is therefore ORDERED, ADJUDGED, and DECREED:
>
> 1. That the plaintiff has a prescriptive easement through the property of the defendants as shown on the survey attached to the defendants' deed filed as Exhibit 2;
>
> 2. That the plaintiff has an easement by virtue of a grant from LaFollette Enterprises, L.P. to the plaintiff and identified as Exhibit 4 at trial;
>
> 3. That the defendant Darryl Sharp had knowledge of the easement over the roadway in question prior to the purchase of his property;
>
> 4. That the defendants' interference with the aforementioned right-of-way was illegal and uncalled for, and the defendants are hereby permanently enjoined from interfering with the easement and they shall be and are hereby required to remove the gate obstructing the plaintiff's easement road;
>
> 5. That the plaintiff is entitled to damages as sanctions for the costs of bringing this action for unlawful interference of his property rights including deposition expenses, court reporter fees and attorney fees;
>
> 6. That the costs of this action be and are hereby taxed to the defendants for which execution shall issue if not sooner paid.

(Capitalization in original.) The judgment was entered September 28, 2006, *nunc pro tunc* August 9, 2006. The Defendants have timely appealed the trial court's judgment.

II.

The issues presented for review by the appellants, stated verbatim, are as follows:

> 1. The Chancellor erred in ordering the removal of the gate and not allowing the defendants to maintain the gate across the easement.

2. The Chancellor erred in awarding attorneys' fees to the plaintiff[].

III.

A review of findings of fact by a trial court is *de novo* upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); ***Brooks v. Brooks***, 992 S.W.2d 403, 404 (Tenn. 1999). Review of questions of law is *de novo*, without a presumption of correctness. *See* ***Nelson v. Wal-Mart Stores, Inc.***, 8 S.W.3d 625, 628 (Tenn. 1999).

IV.

A.

Despite the Defendants' contention that the proof shows there were gates across the easement, Mr. Hatmaker, the owner of LaFollette Enterprises and the prior owner of the property at issue, testified that during the more than 20-year period that he owned the property, the Plaintiff used the easement for ingress and egress to his property without the interference of any gate. Additionally, the proof before the court shows that the Defendants purchased the property with knowledge of the easement. On cross-examination, Mrs. Sharp testified as follows:

Q: My question is the -- the easement or the roadway is clearly identified on the deed that you --

A: The roadway is --

Q: -- received?

A: -- clearly identified, yes.

* * *

Q: And it's referred to in the deed itself as a private drive, isn't it?

A: I don't think it's referred to in the deed.

Q: Well, let me -- let me ask you to take your time and review that document, but if --

A: Oh, yes, the private drive.

* * *

Q: Your own surveyor, according to your testimony, referred to this as a private drive and clearly delineated it on the survey going to the Ferguson property and you were aware before you purchased this property that that was the way that the Fergusons got to theirs, weren't you?

A: I had seen them cross it, but, no, Lonnie Hatmaker had told us that that was only by permissive use, that they had their other driveway.

Q: I'm asking you whether you were aware that that's how they got to their property?

A: On occasion, yes.

The preponderance of the evidence presented to the court establishes that the Defendants have utilized their gate in an improper and illegal manner to deny the Plaintiff access to his property and to harass him despite the court order prohibiting these actions by the Defendants. The Plaintiff has an easement by prescription free of the impairment of the easement by the erection of gates. The court's findings on these issues are supported by a preponderance of the evidence. The court did not err in requiring the Defendants to remove the gate.

The Defendants' reliance on ***Cooper v. Polos***, No. E2001-00665-COA-R3-CV, 2002 WL 499272 (Tenn. Ct. App. E.S., filed April 3, 2002) is misplaced. That case has no precedential value to a case such as the one before us involving, as it does, a prescriptive easement of more than 20 years in length without an impediment during that period of a gate.

B.

At the conclusion of the trial, the court found that the Plaintiff was entitled to sanctions in the form of the costs of having to bring the suit, including deposition costs, court reporter fees, and attorney's fees. An agreed order was presented for attorney's fees and expenses in the amount of $7,870.06. The Defendants assert in this appeal that the trial court's award of attorney's fees is contrary to public policy. They contend there is neither statutory authority nor a contract entitling the Plaintiff to such an award.

The trial court determined these damages as sanctions. The courts of this state have inherent authority to order punishment for acts of contempt. ***Reed v. Hamilton***, 39 S.W.3d 115, 117-118 (Tenn. Ct. App. 2000). This authority is limited in that the court may only punish as contemptuous the type of acts described in Tenn. Code Ann. § 29-9-102 (2000). ***Id.*** at 118. Tenn. Code Ann. § 29-9-102 provides as follows:

> **Scope of power. –** The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases:
>
> * * *
>
> (3) The willful disobedience or resistance of any officer of the such courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of such courts . . . .
>
> * * *

Civil contempt occurs when a person does not comply with a court order and a party brings an action to enforce his or her rights under the order that have been violated. ***Reed***, 39 S.W.3d at 117-118. Punishment for civil contempt is designed to coerce compliance with the court's order as imposed at the insistence and for the benefit of the private party who has suffered a violation of his or her rights. Further, Tenn. Code Ann. § 29-9-105 provides that if the contempt consists in the performance of a forbidden act, the person may be imprisoned until the act is rectified by placing matters and the person in status quo or by the payment of damages. Damages awarded under the statute are compensatory in nature and the appropriate measure of damages under is actual loss, which may include attorney's fees. ***Reed***, 39 S.W.3d at 119. While no contractual agreement or statutory provision exists which addresses attorney fees in a contempt proceeding, the trial court is vested with much discretion in the allowance of attorney fees. ***Id.*** An appellate court will not interfere with the trial court's award of attorney fees except upon a showing that the trial court abused its discretion.

This case involved a clear violation of the orders of the trial court. Our review of the record reveals that the Defendants interfered with and denied access by the Plaintiff to his property by use of the easement. The Plaintiff had to file motions requesting that the court find the Defendants in contempt of court. The trial court's memorandum opinion and the judgment

specifically describes the damages as sanctions and not just attorney's fees and costs. Accordingly, the trial court did not abuse its discretion in issuing sanctions for the contempt shown by the Defendants to the court's orders. The trial court had clear authority to assess attorney's fees against the Defendants pursuant to Tenn. Code Ann. § 29-9-105. The award served to compensate the Plaintiff for the loss he sustained as a result of the actions of the Defendants.

V.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Denise Sharp. This case is remanded to the trial court for collection of costs assessed below, pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE