IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 26, 2014 Session

DAVID N. HALBROOKS v. JACOBUS MARINUS DURIEUX

Appeal from the Chancery Court for Hickman County
No. 10035C Jeff Bivins, Judge

No. M2013-00958-COA-R3-CV - Filed June 30, 2014

Holder of easement (dominant estate) brought suit against owner of land (servient estate) alleging interference with his use of the easement by the servient estate's construction of a building on the easement. The trial court found that the servient estate's actions did not constitute unreasonable interference with the dominant estate's use of the easement for ingress and egress. Because the evidence does not preponderate against the trial court's findings, we affirm.

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

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Amy J. Farrar, Murfreesboro, Tennessee, for the appellant, David N. Halbrooks.

Allston Vander Horst, Centerville, Tennessee, for the appellee, Jacobus Marinus Durieux.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

David H. Halbrooks is the owner of a triangular tract of land in Hickman County

identified on a survey as Tract 10.[1] Jacobus Marinus Durieux owns a tract of land, Tract 6, a portion of which abuts the southeastern edge of Tract 10. Mr. Halbrooks holds an ingress/egress and utility line easement upon a fifty-foot-wide strip of land on Tract 6; the easement separates Tracts 9 and 10 (to the west) from Tracts 5 and 6 (to the east). The original deed language creating the easement contains the following statement regarding the purpose of the easement:

> The purpose of these two easements [including the easement at issue] is to give the owners of said tracts, including the Michael Halbrooks and Elbert Woodruff tracts an easement for road, utility lines, water and gas line[s] and sewage lines, with the right to maintain and construct the same.

On February 17, 2010, Mr. Halbrooks filed a complaint alleging that Mr. Durieux "has erected a retainer wall and frame building on the 50 feet wide strip of land [the easement] that currently encroaches and extends over the boundary line between [Mr. Halbrooks's] land and [Mr. Durieux's] land and therefore trespasses onto Plaintiff's land." Mr. Halbrooks asserted a cause of action for interference with an easement interest, claiming that the frame building on the easement "materially obstructed and hindered the Plaintiff's use and enjoyment of the easement." As a remedy, Mr. Halbrooks requested an injunction ordering Mr. Durieux to remove the frame building from the easement and from his property and to return the surface to its original state.

In his answer, Mr. Durieux admitted that he had built the structure described in the complaint, but stated that his "home does not encroach on the road surface part of the easement as it has been used at least since 1989." He claimed ownership of the affected property by adverse possession. Mr. Durieux also alleged that there was "not any practical accessibility from the Defendant's block home and from the portion of easement driveway where the block home is located . . . to the Plaintiff's property because of a steep bank" and that any damage to Mr. Halbrooks's property was "in the most minimal way imaginable."

The trial court granted Mr. Halbrooks a temporary injunction preventing Mr. Durieux from selling the land affected by the easement or making any improvements to the building located on the easement and on Mr. Halbrooks's land.

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[1]The parties agreed that a boundary survey done by surveyor Boyd B. Gibbs in April 2010 provides an accurate reflection of the property lines and the easement boundaries involved in this matter.

The hearing

The matter was heard in a bench trial on November 5, 2010. Upon stipulation of the parties, Boyd Gibbs testified as an expert in the field of surveying. Mr. Gibbs testified about the property at issue and about the survey he completed in October 2009. He stated that, "The building [built by Mr. Durieux] was entirely within the easement and partially across Mr. Halbrooks' boundary." Mr. Gibbs explained that, in addition to the building itself, there was a concrete retaining wall "around the back and side" of the building and another retaining wall in the building's front yard. At the time of Mr. Gibbs's 2009 survey, the retaining wall in the rear of the building was not under the roof, but it appeared that Mr. Durieux was in the process of extending the roof.

As to the easement, Mr. Gibbs testified that Mr. Halbrooks had a right of access through the easement to Durieux Lane [the roadway on the eastern side of Mr. Halbrooks's property], as well as a right of access to Pike Lane pursuant to another easement on the western side of his property.

Mr. Gibbs completed a second survey in April 2010. He testified that, by April, "the retaining wall area had been put under roof, and the roof extended out a little further into Mr. Halbrooks' property, about ten inches."

Mr. Durieux contacted Mr. Gibbs in the spring of 2010 to mark his lines for the purpose of timber removal. Mr. Gibbs testified that, after he marked the lines, a reasonable person could have seen where the boundary lines were. Counsel for the plaintiff then asked Mr. Gibbs about the effect of Mr. Durieux's building on Mr. Halbrooks's ability to use the easement:

> Q. Can Mr. Halbrooks exit his property where this building is?
> A. Well, I'm not sure what you mean by that, but he could walk, but nobody could drive off that hill.
> Q. Would he have to walk around it?
> A. He would have to walk around it.
> Q. Or over it?
> A. Well, he'd have to walk to one side or the other.
> Q. Now you're saying that he can't drive off this hill between the block foundation and the building. He couldn't drive off that?
> A. Not today. It's wooded. It's steep.
> Q. Can it be made as a driveway?
> A. Well, I suppose it could.
> THE COURT: You think it would be difficult to do that?

> THE WITNESS: I wouldn't recommend it. Let's put it that way.
> THE COURT: Would that be because of the terrain as you see it now, or was that impacted by the fact that the building is there?
> THE WITNESS: Well, even without the building it's a fairly steep hill. It's about 30 feet high from—the front of his building is on level ground, and the top of the hill where the unfinished block foundation is probably 30 feet higher.
> BY MR. HINSON [plaintiff's counsel]: Was a great deal—excuse me. How much of Mr. Halbrooks' property was cut out for the placement of this building?
> A. Well, at least the length of that retaining wall area, which is about six or seven feet, and then probably 30 feet along the back of the building is cut into that hill.

A discussion then followed concerning the possible effects of removing the retaining wall.

Mr. Gibbs testified that there were "plenty of places" on Tract 6 where Mr. Durieux could have placed his building.

The court then questioned Mr. Gibbs about the effect of Mr. Durieux's building and retaining wall on the ability of vehicles to pass by on Durieux Lane. Mr. Gibbs stated: "I think two cars could pass there where he's put a retaining wall in front of the house, but there's still room."

On cross-examination, defense counsel questioned Mr. Gibbs about his recommendation for the best place to put in a driveway from the block foundation where Mr. Halbrooks proposed to build a garage to Durieux Lane. Mr. Gibbs pointed out that there was a ravine cutting through Mr. Halbrooks's property. Taking the ravine into account, Mr. Gibbs's recommendation for the best place to put in a driveway was 150 to 200 feet north of Mr. Durieux's house. The slope of Mr. Halbrooks's property was not as steep at that point and Mr. Gibbs thought the project would require "the least amount of earth work" at that location. Mr. Gibbs testified that the encroachment caused by Mr. Durieux's building was a triangle measuring about 112 square feet.

On redirect, plaintiff's counsel questioned Mr. Gibbs further about his proposed location for the driveway to Durieux Lane:

> Q. This line right here, what does that denote, this dotted solid line on tract 10?
> A. That is the ravine we've been discussing.

Q. And is that a watershed?
A. Well, it's a natural drain.
Q. Natural drain. Are you recommending to this Court that the ideal spot is to go across this ravine to fill that in, to put a culvert? Fill all that in, that ravine, and then go and then make access to the back of Mr. Halbrooks' property?
A. If you were going to try to come in off this Durieux Lane, yes, sir.
Q. Why would you go across the watershed?
A. Just to keep from cutting that hill, because it's going to be top to bottom, a long cut.
Q. Is that a longer distance to do that—
A. It may be.
Q. —than a straight line from the building to the block foundation.
A. It would be a longer distance.
Q. That would call for more gravel?
A. It may cost more in gravel, but I think it would save you on the erosion control.
Q. Now, erosion control. Before this building was there, was the retaining wall needed?
A. No. The slope was natural.
Q. It was just fine?
A. Right.
Q. Is there an erosion problem now?
A. Yes.
Q. Why is that?
A. It's that little house is too close to that hill.
Q. Is that because he cut into it?
A. He got right up against it.
Q. And he was creating an erosion problem on this easement?
A. Well, he's tried to avoid that by building a retaining wall.
Q. So is there an ideal place to put a driveway?
A. It's not very ideal anywhere.

The next witness was James Wilson Hassle, who testified on behalf of the defendant. Mr. Hassle had been in the construction business for over 50 years and testified that he had extensive experience building roads and driveways in Hickman County. Mr. Hassle had been out to Mr. Durieux's property. He had been asked by defense counsel to give an expert opinion regarding where he would put the driveway connecting Mr. Halbrooks's garage with Durieux Lane. Mr. Hassle stated that he would "put it over where the ravine is because standing down in front of the cabin [Mr. Durieux's house], up there is probably 30 feet

higher." According to Mr. Hassle, the county standard was to build roads "no steeper than eight percent." Mr. Hassle heard the testimony of Mr. Gibbs and stated that they were recommending building the driveway in the same place.

With an enlarged culvert, Mr. Hassle estimated that he could put a driveway up to Mr. Halbrooks's back yard [but not to the location of the block foundation intended for the garage] in for about $1,500. He recommended covering the driveway with chert, not gravel. Mr. Hassle gave an estimate for removing Mr. Durieux's house of $20,000. For removing only the portion of the house that encroached on Mr. Halbrooks's property—the retaining wall, concrete and roof up "to the original part of the house"—and repairing the remaining roof, he gave an estimate of $5,000. He thought removing the retaining wall would create problems with erosion on Mr. Halbrooks's property.

Upon stipulation of the parties, the plaintiff introduced Steve McClanahan as an expert in surveying, engineering, and construction. He had visited the site. Asked where he would put a driveway from the easement to Mr. Halbrooks's property, Mr. McClanahan opined that, "The only option with the structure in place is what the people [other witnesses] have been calling at the gully and going across the back of tract 10, or Mr. Halbrooks' property." He estimated that there were about 80 to 100 feet from the end of Mr. Durieux's house to the gully, where "the theoretical driveway would begin." Mr. McClanahan estimated there was about a twenty-five-foot grade difference between this location and the location of Mr. Durieux's house.

Mr. McClanahan testified about the pros and cons of both possible driveway routes—to the location of Mr. Durieux's house or to the location near the gully identified by all three witnesses:

> There's pluses and minuses to both routes. If we come across from the gully and across the back, it's a longer driveway. The slope is less. It's going to be probably in the—I would guess 12, 14 percent slope for that driveway. If you tried to come straight up from the easement in the location where [Mr. Durieux's] house exists now, you know, with some grading you could probably get a 22 to 24 percent grade driveway there. That would be shorter. If you come across the long way you're going to be damaging timber, taking some timber. What little I looked at from the easement, it looked like a couple of pretty good white oaks up there. Things like that would need to be evaluated to determine what's the most feasible route.

Upon questioning by the court, Mr. McClanahan testified that he had not done a professional evaluation of where to put the driveway.

The court also asked Mr. McClanahan if it would be feasible to build a driveway with a twenty-four percent grade. He answered in the affirmative. Commenting on Mr. Hassle's testimony, Mr. McClanahan stated that the eight percent grade limit applied to public roads. He testified that he had recently done two driveways with grades of about twenty percent and that "twenty percent range is not . . . ideal, but it's not something that's prohibitive of access to property." Mr. McClanahan stated that there was an electrical transformer between Mr. Durieux's house and the southeast boundary line of Mr. Halbrooks's property. When asked whether the "slope from the block foundation to the building in question" would be "out of the range of construction," Mr. McClanahan said it was not and that "if the house were not there and the electrical transformer were not there, that would be a viable option."

When Mr. McClanahan visited the property, there was a car parked near the retaining wall in the front yard of Mr. Durieux's house. Mr. McClanahan could not drive past Mr. Durieux's house and stay in the easement. If the car had not been parked there, he could have driven past the house.

Mr. McClanahan was asked questions about tearing down all or part of the structures built by Mr. Durieux. To remove only the part encroaching on Mr. Halbrooks's property, he estimated a cost of $5,000. To remove the entire structure, he estimated that the cost would be above the same because one would not have to protect any property that was not being torn down. Mr. McClanahan opined that, if the entire structure were to be torn down, he would also remove the retaining wall and try to restore the hill to its original slope by backfilling dirt and sod.

Mr. McClanahan saw no reason why Mr. Durieux could not have built a house on his property outside the easement.

The parties had also stipulated that the next witness, Dean Edwards, was an expert in real estate appraisal and the general real estate business. He had been out to inspect the property at issue. Mr. Edwards estimated the value of Mr. Halbrooks's property upon which Mr. Durieux's structures encroached to be $250. He estimated the value of Mr. Halbrooks's total property, with or without the small area of encroachment, to be $25,000.

On cross-examination by plaintiff's counsel, Mr. Edwards testified that he did not do a comparable analysis in determining the value of Mr. Halbrooks's property because "[t]here's no way to do a comparable analysis on that property right now." He stated that $25,000 was actually "way higher than [Mr. Halbrooks's] property is worth." Asked if Mr. Durieux's building being on the property line would affect the fair market value of Mr. Halbrooks's property, Mr. Edwards testified:

> It would affect his value if a buyer came in there. They wouldn't want that—they wouldn't want that built on that property. They would want it—they would want some kind of compensation or redo the property lines.

He further testified that "the owner of that property would have to clear the problems off before he put his property up for sale." Mr. Edwards did not include the value of Mr. Halbrooks's house in his appraisal. He was only concerned with the value of the small piece of land upon which Mr. Durieux's structures encroached. In response to a question from the court, Mr. Edwards opined that a title insurance company would not issue a policy on the property if they saw the survey.

The plaintiff next called Mike Halbrooks, owner of a tract to the south of the plaintiff, David Halbrooks. Mike Halbrooks bought his property in 1987; he had an easement to Pike Lane on the western side of his property, as well as the same fifty-foot easement on to Durieux Lane. He primarily used Pike Lane to access his property. Mike Halbrooks testified that he was familiar with Tract 10, David Halbrooks's property, and the easements on each side of that property.

Mike Halbrooks estimated that Mr. Durieux's building was erected about nine years earlier. He testified that he had been to the building in 2009, but he could not recall how much had been completed at that time. Mr. Halbrooks went and looked at the building a week before the hearing; he stated that it was bigger than when he had seen it previously. On cross-examination, Mr. Halbrooks stated that he had used the easement to Durieux Lane for about a year after he bought his property. At that time, there was no road on the western side of his property. After Pike Lane was built on the western side of Mr. Halbrooks's property, he no longer used the easement onto Durieux Lane.

Mr. Durieux was also called as a witness by the plaintiff. He testified that his primary residence was in the Netherlands and that he visited his property in Hickman County about twice a year for two months at a time. He purchased his property in 1989 and was not aware of the easement at issue here. He began building what was initially a storage building in 1992. Asked why he chose the location, Mr. Durieux stated that it seemed to be the most level area. He thought that the road [now Durieux Lane] ended where he built. Mr. Durieux acknowledged that the road continued past his house but it was no longer used. Mr. Durieux finished the house in 1995.

In 2009, Mr. Halbrooks informed Mr. Durieux that his house was encroaching on Mr. Halbrooks's land and that the rest of his house was on an easement. Mr. Durieux testified that he made improvements to his property after 2002, when the easement was granted to Mr. Halbrooks. He stated that he did not understand the significance of the easement. Mr. Gibbs,

the surveyor, spoke with Mr. Durieux in 2009 and explained the encroachment on Mr. Halbrooks's property and the easement. Mr. Durieux continued to make improvements to his house. He estimated that his building was worth about $25,000. Mr. Durieux testified that he would have no problem with Mr. Halbrooks using his easement to get to his property. He admitted that Mr. Halbrooks had asked him to stop construction until this matter was resolved, but he continued to build.

On cross-examination, Mr. Durieux stated that the retaining wall behind his house was built in 2008. He installed a French drain on Mr. Halbrooks's side of the wall. According to Mr. Durieux, he did not extend the building or retaining wall any further onto Mr. Halbrooks's property after 2008. The construction in 2009 involved improvements on the easement. Mr. Durieux stated that, when he bought his property, what is now known as Durieux Lane was just a dirt track; he widened the portion leading to his house and put chert on it. Past Mr. Durieux's house, the road was "worse."

Asked about the block wall built in the front of the house, Mr. Durieux stated that the distance from that wall to the house was twenty-one feet. He was willing to park his car so that the passage was unobstructed.

David Halbrooks, the plaintiff, was called to the witness stand. He inherited Tract 10 from his father in late 2008. He saw Mr. Durieux's house at the bottom of his property and called Mr. Gibbs to do a survey in late 2008. The survey showed that Mr. Durieux's house was over Mr. Halbrooks's property line.

Mr. Halbrooks stated that he first met Mr. Durieux in 2009; he went to Mr. Durieux's house, explained the encroachment, and expressed a desire to "work something out." He asked Mr. Durieux to cease further construction, and he thought that Mr. Durieux agreed. After that, Mr. Durieux erected a gate across the easement, which he eventually agreed to remove. Mr. Halbrooks also testified about other construction done after his conversation with Mr. Durieux.

Mr. Halbrooks identified pictures of a block foundation on his property where he had started building a garage. He testified that Mr. Durieux's house "limited the access to the property." Mr. Halbrooks did not want to build his driveway in the location (along the gully) described by previous witnesses. He testified that this gully or ravine was "an entrance to a holler" and served as a watershed. Mr. Halbrooks opined that the most feasible spot for his driveway (connecting his garage with Durieux Lane) was "right along that property line there that abuts the Woodruff property [the tract immediately to the south of Mr. Halbrooks's property]." Mr. Halbrooks wanted to put his driveway there "because it's the best use of the land for me anyway, because I can still use the other part of the land."

Mr. Halbrooks testified that, if there was a car parked near Mr. Durieux's house, "you couldn't get past the building." Even if there was no one there, "there was the block foundation in front of it," and "you was unable to get off the easement on the other side of his property." According to Mr. Halbrooks, "right where [Mr. Durieux's house] is I can't turn into my own or do anything with it right now." He testified that he would like to have access to his garage site from Durieux Drive.

On cross-examination, Mr. Halbrooks was asked whether, even with the obstruction caused by Mr. Durieux's house, he still had several hundred feet of access he could use to connect the back part of his property to Durieux Lane. He stated, "It would depend on the route you want to take and what part of the property." Mr. Halbrooks testified that his father had bought Tract 10 around 1989 and that he himself had lived there some in the 1990s. He admitted that there appeared to be other options (besides the location of Mr. Durieux's house) for building a driveway to Durieux Lane.[2]

Trial court decision

In an order entered on March 22, 2013, the trial court made the following pertinent findings and conclusions:

> Mr. Durieux built a concrete block building on the 50 feet wide strip [easement] from 1993-1995. In 2008-2009 an addition to the block building was constructed on the 50 feet wide strip that extended over the common boundary line of Mr. Halbrooks' and Mr. Durieux's land and encroached upon Tract 10 owned by Mr. Halbrooks. Mr. Durieux argued that he adversely possessed the land that the building was constructed upon from 1993-1995. However, Mr. Durieux conceded that the addition and improvements that were constructed from 2008-2009 did not comply with the requirements for adverse possession. Mr. Halbrooks argued that the portion of the building that was constructed upon Tract 10 was a trespass and encroachment that must be removed with the land being restored to its original state. Mr. Halbrooks further argued that the portion of the building that was constructed upon the 50 feet wide strip had materially obstructed and hindered the Plaintiff's use and enjoyment of the easement as intended and must also be removed with the land being restored to its original state.
>
> Regarding the Defendant's interference with the Plaintiff's easement interest in the 50 feet wide strip, the Court finds that the Plaintiff has access to Tract

[2]Two of Mr. Halbrooks's neighbors, Woody Woodruff and Wayne Doss, also testified.

> 10 by way of Pike Lane and several hundred feet on the 50 feet wide strip that is not obstructed by the Defendant's block building as shown on the survey. The Court further finds (consistent with the holding of the Court of Appeals in *Lowe v. Gulf Coast*[,] 1991 WL 220576 (Tenn. Ct. App.))[,] that at this time, the Plaintiff has reasonable access to his property from other access points. The block building does not currently interfere with the purpose of the easement, however, if at some point in the future the easement becomes further improved upon or obstructed and more burdensome, or the Plaintiff requires full access to the easement (consistent with the holding of the Court of Appeals in *Lowe v. Gulf Coast*[,] 1991 WL 220576 (Tenn. Ct. App.)), then the concrete block building would have to be removed from the 50 feet wide strip.
>
> The Court further finds that the elements of adverse possession have not been proven at this time and the facts do not support the argument of adverse possession for the Defendant. Mr. Durieux is therefore ordered to EITHER remove that portion of the concrete building and all additions and improvements that are outside the 50 feet wide strip and encroach upon the property of the Plaintiff known as Tract 10 on the survey, OR remove the entire concrete building and all additions and improvements that are on the 50 feet wide strip and encroach upon the property of the Plaintiff known as Tract 10. The Court finds there was conflicting testimony on the cost of partial removal and complete removal of the building. The Court further finds that upon removal of any portion of the building and improvements, the Defendants shall restore the land that any structure rested upon to its original pre-construction state.

The trial court denied the plaintiff's prayer for punitive damages and attorney fees.

Issues on appeal

On appeal, Mr. Halbrooks argues that: (1) the trial court erred in holding that Mr. Durieux's building does not interfere with the purpose of the easement, and (2) he is entitled to punitive damages. Mr. Durieux argues in favor of the trial court's decision; he also asserts that, even if the court does not apply the holding of *Lowe v. Gulf Coast Development, Inc.*, No. 01-A-019010CH00374, 1991 WL 220576 (Tenn. Ct. App. Nov. 1, 1991), this court should determine, pursuant to Tenn. Code Ann. § 28-2-103, that Mr. Durieux is entitled to that part of the easement upon which he built his home under the doctrine of adverse possession.

STANDARD OF REVIEW

In an appeal of a decision rendered after a bench trial, we review the trial court's findings of fact de novo with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn.1993). Moreover, we "give great weight to the trial court's assessment of the evidence because the trial court is in a much better position to evaluate the credibility of the witnesses." *Boyer v. Heimermann*, 238 S.W.3d 249, 255 (Tenn. Ct. App. 2007). We review questions of law de novo with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

ANALYSIS

An easement is "an interest in property that confers on its holder a legally enforceable right to use another's property for a specific purpose." *Hall v. Pippin*, 984 S.W.2d 617, 620 (Tenn. Ct. App. 1998). The owner of the easement has the dominant estate, and the owner of the underlying property has the servient estate. *Rogers v. Roach*, No. M2011-00794-COA-R3-CV, 2012 WL 2337616, at *8 (Tenn. Ct. App. June 19, 2012). The following principles apply to the respective rights of the two estates:

> Although the rights of the easement owner are paramount, to the extent of the easement, to those of the landowner, the rights of the easement owner and of the landowner are not absolute, irrelative, and uncontrolled, but are so limited, each by the other, that there may be a due and reasonable enjoyment of both the easement and the servient estate.

Carroll v. Belcher, No. 01A01-9802-CH-00106, 1999 WL 58597, at *4 (Tenn. Ct. App. Feb. 9, 1999) (quoting 10 TENNESSEE JURISPRUDENCE, *Easements* § 6 (1994)). Each party's rights "must be examined in the context of the entire situation and should be balanced so as to protect the rightful use by each party of his or her interest." *Keenan v. Fodor*, No. M2012-00330-COA-R3-CV, 2014 WL 793713, at *7 (Tenn. Ct. App. Feb. 26, 2014).

The owner of the servient estate "may use his property in any manner consistent with the existence of the easement," but cannot "make any alterations in his property by which the enjoyment of the easement will be materially interfered with." *Id.* Thus, the rule is that, "The owner of the servient estate *cannot take actions that unreasonably interfere with easement holder's rights under the easement*, including any alterations in the landowner's property." *Rogers*, 2012 WL 2337616, at *9 (citing *Cox v. E. Tenn. Natural Gas Co.*, 136 S.W.3d 626, 628 (Tenn. Ct. App. 2003)) (emphasis added). The issue in cases involving unreasonable interference by a servient estate with the dominant estate has been stated:

> "[W]hether, under the specific facts presented, the [obstruction] is necessary to the use and enjoyment of the landowner's land and whether it does not unreasonably interfere with the easement holder's use of the right of way."

Shell v. Williams, No. M2013-00711-COA-R3-CV, 2014 WL 118376, at *10 (Tenn. Ct. App. Jan. 14, 2014) (quoting *Roach*, 2012 WL 2337616, at *9); *see also Cooper v. Polos*, 898 S.W.2d 237, 241-42 (Tenn. Ct. App. 1995). Determining whether a particular type of interference is reasonable "requires consideration of all the circumstances, including the purpose and reasonable use of the easement and the landowner's reasons for installing [the improvement]." *Rogers*, 2012 WL 2337616, at *11.

An easement created in a deed, such as the easement at issue in this case, is an express easement. *Shell*, 2014 WL 118376, at *4. In construing an instrument creating an easement, the court must "'ascertain and give effect to the intention of the parties.'" *Id.* (quoting *Burchfiel v. Gatlinburg Airport Auth.*, No. E2005-02023-COA-R3-CV, 2006 WL 3421282, at *3 (Tenn. Ct. App. Nov. 28, 2006)). The intention of the parties regarding the purpose and scope of an express easement is determined by the language of the deed. *Id.* The dominant estate's "use of the easement must be confined to the purpose stated in the grant of the easement." *Columbia Gulf Transmission Co. v. The Governor's Club Prop. Owners Ass'n*, No. M2005-01193-COA-R3-CV, 2006 WL 2449909, at *3 (Tenn. Ct. App. Aug. 21, 2006).

The burden of proof is on the dominant landowner to show that the servient landowner's actions unreasonably interfered with his use of the easement. *Shell*, 2014 WL 118376, at *9. In this case, Mr. Halbrooks had to prove that Mr. Durieux's actions had unreasonably interfered with his use of the easement.

We begin with the language of the easement, which provides that its purpose is to give the dominant landowner "an easement for road, utility lines, water and gas line[s] and sewage lines, with the right to maintain and construct the same." For purposes of this appeal, the issue is Mr. Halbrooks's right to use the easement for ingress and egress.

The use of an easement for ingress and egress, where not otherwise specified, is confined to "'only such as is reasonably necessary and convenient for [the] purpose for which it was created.'" *Burchfiel*, 2006 WL 3421282, at *3 (quoting *Adams v. Winnett*, 156 S.W.2d 353, 357-58 (Tenn. Ct. App. 1941)). A dominant estate "has the ability to use the entire width of the easement for authorized uses," but the dominant landowner must prove that, as a result of the servient estate's actions, he is "prevented from engaging in any authorized activities." *Shell*, 2014 WL 118376, at *10. Although we know of no Tennessee cases dealing with the servient estate's construction of a building on the easement, decisions regarding the construction of gates and other structures suggest that a servient estate may

erect a building on the easement as long as it does not unreasonably interfere with the dominant estate's use of the easement. *See id.* (concluding that the dominant estate had not been "prevented from engaging in any authorized activities as a result of the [servient estate's] placement of the trees and boulders"); *Rogers*, 2012 WL 2337616, at *12 (concluding that dismissal of dominant estate's claim of interference was inappropriate because dominant estate presented evidence that posts of fence erected by servient estate were "too close to the easement or roadway to allow her to make reasonable use of her property"); *Gammo v. Rolen*, No. E2009-02392-COA-R3-CV, 2010 WL 2812631, at *3 (Tenn. Ct. App. July 19, 2010) (holding that gate across access easement should not be enjoined as long as the dominant estate had "reasonable access").[3]

In concluding that Mr. Durieux's actions had not unreasonably interfered with Mr. Halbrooks's use of the easement, the trial court relied on the case of *Lowe v. Gulf Coast Development, Inc.*, 1991 WL 220576, at *1. The dispute in *Lowe* involved the construction of a hotel. *Lowe*, 1991 WL 220576, at *1. The owners of property, the Lowes and others ("the Lowes"), leased a tract to Gulf Coast Development, Inc. ("Gulf Coast"), for the construction of a hotel. *Id.* The lease specifically recognized two existing easements for ingress and egress. *Id.* at *2. The Lowes filed suit against Gulf Coast alleging, among other claims, that Gulf Coast was encroaching on a fifty-foot easement that was to provide ingress and egress to a remaining undeveloped tract. *Id.*

Gulf Coast admitted that it had "erected improvements on the easement, including two signs, a street light, a catch basin, and an electrical conduit." *Id.* at *9. The trial court found that the easement provided the property owners with "an unobstructed, useable easement to their adjacent land," but that the two signs were not currently obstructing access to the adjacent land and had not caused any loss of rental value to the Lowes' remaining tract of land. *Id.* The court determined that the hotel would not be required to move the signs unless they became "an obstacle to Plaintiffs' development of their remaining property." *Id.* If the signs were removed, the court held, the hotel would have to "prepare, pave, and keep in good repair an easement to Plaintiffs' remaining property." *Id.*

On appeal, this court agreed that the evidence showed that the improvements "have not obstructed the property owners' access to the adjoining property." *Id.* at *10. The court went on to find that the improvements "are not encroachments because the easement is non-

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[3] *See also* James W. Ely & Jon W. Bruce, THE LAW OF EASEMENTS & LICENSES IN LAND § 8:22 (2014) (footnotes omitted) (stating that the "prevailing view is that the owner of a servient estate may not erect any structures that encroach on a right-of-way," but that "[s]ome courts . . . adhere to the view that the landowner is entitled to place a structure on an easement of passage if the structure does not prevent use by the easement holder.").

exclusive, and [the hotel] is entitled to use the property in any reasonable manner that does not interfere with the property owners' easement rights." *Id.* The court concluded that the improvements did not constitute encroachments and that "there is no evidence that the property owners have been damaged in any way by the improvements the lessee constructed in the easement." *Id.* at *11.

In this case, Mr. Halbrooks argues that Mr. Durieux's building "is obstructing access to a significant portion of the easement" and that "the only alternate route to use the easement would be unduly burdensome" for him. The reasonableness of the servient estate's actions must be determined by considering all of the circumstances; thus, the trial court is required to make a factual determination. *See Rogers*, 2012 WL 2337616, at *11. Finding that Mr. Halbrooks had access to his property by way of "several hundred feet on the 50 feet wide strip that is not obstructed by the Defendant's block building," the court concluded that he had "reasonable access to his property from other access points."[4] The court went on to state, however, that, "if at some point in the future the easement becomes further improved upon or obstructed and more burdensome, or the Plaintiff *requires* full access to the easement . . . , then the concrete block building would have to be removed from the 50 feet wide strip." (Emphasis added).

There was evidence concerning the pros and cons of building a driveway at the site of Mr. Durieux's house versus building it at the site further north suggested by Mr. Gibbs and Mr. Hassell. No expert recommended the site of Mr. Durieux's building. The proof established that, without the area obstructed by Mr. Durieux's house, there were several hundred feet of useable access from Mr. Halbrooks's property onto Durieux Lane. Furthermore, there was evidence that, if Mr. Durieux did not park his car in front of the house, two cars could pass by on the easement.

The trial court determined that Mr. Halbrooks failed to prove that Mr. Durieux's house resulted in an unreasonable interference with his use of the easement. The evidence does not preponderate against that decision. In light of this conclusion, the remaining issues presented on appeal are pretermitted.

[4] We agree with Mr. Halbrooks that the availability of access on Pike Lane, also referenced by the trial court, is irrelevant. The easement entitled him to access on Durieux Lane.

CONCLUSION

The judgment of the trial court is affirmed. Costs of appeal are assessed against the appellant, and execution may issue if necessary.

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ANDY D. BENNETT, JUDGE