IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 5, 2008 Session

ROBERT HOSKINS and wife, DELINDA HOSKINS v. STANLEY JOE WILLIAMS and wife, ELIZABETH WILLIAMS

Direct Appeal from the Chancery Court for Union County
No. 5280 Hon. Billy Joe White, Chancellor

No. E2008-00481-COA-R3-CV - FILED FEBRUARY 23, 2009

In this dispute over the use of a driveway, the Trial Court rejected plaintiffs' claim to an easement and held that plaintiffs were only entitled to the express easement granted in their deed. Plaintiffs appealed and we affirm the Judgment of the Trial Court.

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 CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

B.J. Reed, Knoxville, Tennessee, for appellants, Robert Hoskins and wife, Delinda Hoskins.

David H. Stanifer and Lindsey C. Cadle, Tazewell, Tennessee, for appellees, Stanley Joe Williams and wife, Elizabeth Williams.

OPINION

Plaintiffs brought this action to establish an easement for a driveway, and sought reimbursement from the defendants for their expense incurred in maintaining the easement.

In the Complaint, plaintiffs attached their deed to the subject property, and alleged that defendants bought the adjoining property in 1998, and also attached a copy of defendants' deed.

Plaintiffs alleged that a right-of-way for ingress/egress had existed across defendants' property for more than 20 years, and that plaintiffs had used this as a driveway and continued to do

so. Plaintiffs alleged that defendants had recently erected fence posts across the driveway and threatened to complete a fence, blocking plaintiffs' use of the driveway.

Further, plaintiffs alleged that they and the defendants had a common grantor, Collins, and attached the deed from Collins to Prices, who were their predecessors-in-title, and that in 1999, defendants subdivided their property and made a one lot subdivision with a 50 foot wide permanent non-exclusive access easement at the site of the disputed driveway. Further that defendants conveyed this lot to John and Connie Williams in 1999.

Defendants answered, stating that they objected to plaintiffs' use of the driveway and that plaintiffs had an easement granted in their deed and did not need to use the driveway. Defendants sought an injunction prohibiting plaintiffs from crossing their property.

At the evidentiary hearing, the parties stipulated into evidence an aerial photo of the property that showed Kanott Lane, and the disputed area of the driveway.

The record reveals there was no dispute regarding the property line, and plaintiffs' lawyer stipulated there was no dispute that plaintiff had no color of title, and would have to prove the 20 year statute.

At the conclusion of the evidentiary hearing, the Trial Court found there was not 20 years of open, adverse, and continuous use of the right-of-way, because the farm was not divided until 1996, and entered an Order dismissing plaintiffs' Complaint.

Issues raised on appeal are:

1. Whether the appellees in certification and dedication of a permanent and non-exclusive access easement in the process of subdividing their property granted rights to the appellants to use the right-of-way?

2. Whether the appellants proved adverse possession of the right-of-way for more than seven years, and appellees are barred from interfering with their use?

Plaintiffs argue that defendants, in granting a permanent and non-exclusive access easement to their son when they subdivided their property, granted rights to plaintiffs to use that right-of-way, and when Collins subdivided her tract and sold one acre to the Prices, "the existing driveway in use since 1939 was so incident to the estate, that the grant carried with it the right of way." Plaintiffs' argument does not take into account the fact that Collins granted an express easement in her deed to the Prices, which was then copied in the deed from the Prices to plaintiffs. Accordingly, the Trial Court did not have to address the question of whether there was some type of implied easement, as the easement was expressly set forth. While the proof is not clear regarding the exact placement of the granted easement, it is not disputed that it only goes so far up the existing

driveway to the front of plaintiffs' property, and does not include the "turn" into the side of plaintiffs' home, which defendants sought to fence. While plaintiffs clearly have an easement that gives them access to their property from Kanott Lane, it does not follow the exact path of the existing driveway.

Plaintiffs rely on the case of *Gammo v. Rolen*, 253 S.W.3d 169 (Tenn. Ct. App. 2007), for the rule that "where the owner of property gives a deed with a call for a street or alley or other way as adjoining the property conveyed, (the owner) is estopped to assert that such right does not exist. In other words, he can not [sic] convey the property abutting the street or alley and afterwards deny to the grantee the right to use the street or alley."

In that case, both parties' tracts came from a common grantor, as here, but the deed to Gammo simply stated that the boundary of her property went "to an iron pin in an alley or driveway which affords an outlet from the Lot hereinabove described to New Street" and did not otherwise expressly describe the easement or right-of-way. *Id*. The Rolens had sought to block Gammo from continuing to use the alley to access New Street, but the court ruled that since "the language in the deed refers to the Alley both as a boundary of the Gammo Tract and as providing access from the Gammo Tract to New Street, we hold as a matter of law that the deed created an easement for use of the Alley on the Rolen Tract in favor of the owners of the Gammo Tract." *Id*. at 173.

The facts of this case differ because the deed from Collins to Price and from Price to plaintiffs expressly describes a particular access easement that runs to the front of appellants' property from Kanott Lane. The easement gives plaintiffs access to their property from a public road, and give them the right to use a portion of the existing driveway, but it simply does not follow the entire path of the existing driveway, which is factually distinct from the *Gammo* case. Accordingly, we cannot imply a greater easement than what was expressly granted under the evidence in this case.

Plaintiffs also argue that by granting a "permanent, non-exclusive access easement" to their son when they deeded him 1.09 acres of their property, defendants also granted plaintiffs the right to use the same easement to access their property. They cite no authority for their position, and obviously, an easement for one party to access his property would not give a third party the right to also use that easement to access a separate piece of property. The case law explains that the term "non-exclusive" is generally used to refer to the type of rights that are maintained by the servient estate, and does not confer rights upon other property owners to use the easement to access their own property, otherwise, it would be designated as a public easement, and/or would not be designated as "access" to the subject property only. *See, e.g., Lowe v. Gulf Coast Development, Inc.*, 1991 WL 220576 (Tenn. Ct. App. Nov. 1,1991). We find plaintiffs' argument to be without merit.

Finally, plaintiffs argue they have proved adverse possession of the driveway because they have shown open, adverse, and continuous use of the driveway for more than seven years. It was admitted that plaintiffs do not have color of title to this driveway, and thus in order to prove

adverse possession they must show open, adverse, and continuous use for more than twenty years. *Williams v. Troyer*, 2004 WL 2916138 (Tenn. Ct. App. Dec. 15, 2004). However, plaintiffs argue they can rely on Tenn. Code Ann. §28-2-103 for a seven year period. This code section, however, is a limitations statute, and case law interpretation teaches that it is to be used as a shield and not a sword. *Hightower v. Pendergrass*, 662 S.W.2d 932 (Tenn. 1983). This argument is also without merit.

In sum, the record establishes that plaintiffs' express easement does not extend to the disputed driveway and plaintiffs were unable to prove the use of the driveway for the required 20 years. We affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to Robert and Delinda Hoskins.

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HERSCHEL PICKENS FRANKS, P.J.