IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 20, 2007 Session

RALPH DAVIS, ET AL. v. DANIEL CUEL, ET AL.

Appeal from the Chancery Court for Campbell County
No. 15375 J. S. Daniel, Senior Judge

No. E2006-02026-COA-R3-CV - FILED DECEMBER 27, 2007

In this boundary line dispute, Ralph Davis and his wife Jackie Davis ("the Davises") sued Daniel Cuel and Francine Cuel ("the Cuels"), alleging that the Cuels had improperly claimed a portion of the Davises' property as their own. Existing surveys supported the Cuels' claim, but the Davises asserted that a prior agreement gave them the right to an additional 0.42-acre tract ("the southern disputed area") on the Cuels' side of the survey boundary. The Cuels, meanwhile, believed that *they* were entitled to more land than the existing surveys indicated, so they hired a surveyor, Dave Bruce, to conduct a new survey ("the Bruce survey"). The Bruce survey indicated that the Cuels are entitled not only to the southern disputed area, but also to an additional area north of it ("the northern disputed area"), on what the earlier surveys had regarded as the Davises' side. The Bruce survey further indicated that an additional tract claimed by the Davises, immediately north of the northern disputed area, is actually a county right-of-way. The trial court adopted the Bruce survey and awarded both the northern and southern disputed areas to the Cuels.[1] As a consequence of this ruling, the Davises, the plaintiffs in this case, actually end up with less land than they started with. They appeal, claiming that the evidence preponderates against the court's factual findings, and also that they should have prevailed on a theory of estoppel or acquiescence. We hold that the evidence does not preponderate against the court's findings, and, even assuming that the Davises did not waive their alternative theories of recovery at trial, the evidence does not support those theories. 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 D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

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[1] For the sole purpose of aiding the reader, we have attached as an appendix to this opinion the relevant portions of the survey of Tony Crutchfield, which survey was introduced as an exhibit in the trial court. We have added three notations: (1) "right of way"; (2) "northern disputed area"' and (3) "southern disputed area." We have also added the two parallel lines encompassing the "right of way" area. The two lines approximate lines from the survey of Dave Bruce.

Robert Asbury, Jacksboro, Tennessee, for the appellants, Ralph Davis and Jackie Davis.

Terry M. Basista, Jacksboro Tennessee, for the appellees, Daniel Cuel and Francine Cuel.

OPINION

I.

Before proceeding to discuss the evolution of this case, it is important to understand that the trial court was presented with three possible lines as the true boundary line between the Cuel property and the Davis property. The southernmost line is the one proposed by the plaintiffs, the Davises, based upon a purported written agreement and the parties' prior conduct. The middle line is the one along which the Cuels built a fence that prompted the Davises' suit; it represents the boundary according to several surveys prior to the Bruce survey. The northernmost line is the one proposed by the Cuels, based upon the Bruce survey. If the court had fixed the boundary at the southernmost line, the Davises would have taken title to both the northern and southern disputed areas. If the court had fixed the boundary at the middle line, the Cuels would have owned the southern disputed area while the Davises would have owned the northern disputed area – essentially the status quo when the case began, albeit a disputed status quo. Instead, however, the court fixed the boundary at the northernmost line, and as a result, the Cuels, the defendants in the proceedings below, now own both disputed areas.

The Cuels purchased their land in 1984. The Davises purchased their land in 1987. At the time of the latter purchase, the parties had a discussion about their disputed boundary, during which the Davises revealed their intention to build a house near the southern end of their property, partially on the strip of land that is now described as a county right-of-way. The Cuels at that time believed that some of the land in question might belong to them. However, the parties were unable in their 1987 discussion to reach an agreement regarding the boundary line, and the Davises proceeded to build their house as planned. The Cuels did nothing to stop the construction, and they conceded at trial that they would be barred by estoppel from demanding that the Davises remove or relocate their house, even if the county were to formally abandon the right-of-way and the Cuels were to become otherwise entitled to half of the way (which would include a portion of the Davises' house). That, however, is not the issue in this case. Rather, this case concerns two disputed areas of land with a combined size of approximately two-thirds of an acre, starting at the southern boundary of the county right-of-way (just south of the Davises' house) and going south from there. The Cuels and the Davises both claim this land. The Cuels make no claim to the right-of-way itself, and it is not really at issue in this case, but is relevant only as a boundary marker.

During the approximately 14 years between the Davises' purchase of the land and their filing suit, both parties continued to informally claim the disputed areas. For instance, both parties had portions of a septic system located on land that the other party claimed. Also, on one occasion, Mr.

Cuel asked Mr. Davis, "When are you going to quit mowing my grass?" Mr. Davis replied, "I ain't mowing your grass" and further stated, "I'm not . . . on your property." Conversely, at trial, Mr. Davis authenticated a photo of Mr. Cuel mowing a portion of the grass that Mr. Davis testified was "on my side of the property." Mr. Cuel, for his part, testified that Mr. Davis verbally accosted and even threatened the Cuels' tenants who ventured onto the disputed territory. Not until after the Cuels fenced off the area in question, however, did this dispute result in litigation.

The Cuels built their fence just inside the middle boundary line, *i.e.*, the one reflecting a line of 88° 16′ 00″ E. This line was delineated on several survey maps of the area, all of which are to some extent based on a 1976 survey by C. Sterling Jones ("the Jones survey"). However, Mr. Cuel testified that he never accepted this line as accurate, believing that he was actually entitled to additional land north of it (*i.e.*, the northern disputed area and possibly more beyond that). He says he built the fence on the middle line "hoping we could get along at that point." However, the Davises, believing that they own both disputed areas, saw the fence as an affront. They filed suit in April 2001, demanding that the fence be removed and asking the court to declare them the rightful owners of the southern disputed area.

When suit was filed, the northern disputed area was not yet "in play." However, once the Davises sued the Cuels, it seems that the latter decided to "play hardball," so to speak. As the Cuels' attorney stated in his summation, "when [Mr. Davis sued them], Mr. and Mrs. Cuel said, Well, okay, if you want a fight . . . we'll fight you too." The Cuels hired a surveyor, Dave Bruce, to do a "virgin" survey of the land. Whereas previous surveyors – including Tony Crutchfield, the Davises' surveyor for this litigation – had simply "resurveyed" or "retraced" the results of the 1976 Jones survey and confirmed that it conformed with the parties' deeds, Mr. Bruce went back to the original source documents, including deeds in the parties' chains of title from as early as 1947, as well as tax maps and a 1947 survey map. Based on these documents, Mr. Bruce concluded that the Jones survey in 1976 had made a mistake, which had been repeated by subsequent surveyors retracing it, including Mr. Crutchfield. According to the Bruce survey, the proper boundary between the Davis and Cuel properties was the northernmost line – the southern boundary of a 30-foot-wide county right-of-way located in between the properties. According to Mr. Bruce, this right-of-way is reflected on tax maps as recent as 1985, and is mentioned in various deeds from 1947 through 1983, including a deed to the parties' common grantor, John Winslow. In his testimony, Mr. Bruce speculated that the absence of the right-of-way from the parties' own deeds, and from the Jones survey and its progeny, is probably a result of the fact that the road that apparently existed on the right-of-way is no longer there, and thus it was simply forgotten. However, the county has never formally abandoned the right-of-way, and, according to the Bruce survey, it represents the correct boundary[2] between the Davis and Cuel properties.

The Bruce survey effectively enlarged the area in dispute from 0.42 acres (the size of the southern disputed area) to just under a full acre – the combined size of the southern disputed area

[2] The properties do not actually abut, according to the Bruce survey. The Davises' land ends at the northern boundary of the right-of-way; the Cuels' land begins at the southern boundary of the right-of-way.

(0.42 acres), the northern disputed area (approximately a quarter-acre), and the right-of-way (approximately a quarter-acre).[3] More importantly, the Bruce survey enlarged the area directly claimed by both parties in this case to approximately two-thirds of an acre. This put the plaintiffs, the Davises, on the defensive. By the time the trial ended, the Davises' attorney was telling the court that his clients would be satisfied if the court would fix the boundary at the middle line. In other words, the Davises were willing to accept the very boundary line that they had originally challenged in their suit. At the end of the trial, they were simply hoping the court would not adopt the northernmost line, the Bruce survey line, which would produce the nightmare result for the Davises of filing suit to *gain* 0.42 acres and ending up with a quarter-acre *less* than what they started with (and an additional quarter-acre of newly disputed land that the county could potentially claim).

That is precisely the result they got, however. When the case finally came to trial in April 2005, the court heard evidence from both sides, including testimony by the surveyors Crutchfield and Bruce. The court then adopted the Bruce survey, declaring that it "is a more accurate description of what is actually owned." Thus, the court fixed the boundary at the northernmost line and gave the Cuels title to both disputed areas. The court did not disturb the Cuels' possession of the county right-of-way, declaring that it "appears to have been abandoned" by the county. The court acknowledged, however, that its ruling is not binding on the county, which was not a party to the case.

The Davises appeal on two grounds.[4] First, they argue that the evidence preponderates against the court's factual findings, specifically its decision to adopt the Bruce survey. Second, they argue that the trial court erred by failing to consider the theories of easement by estoppel and boundary by acquiescence. We will address these arguments in turn.

II.

"The review of a decision rendered in a boundary dispute is *de novo* upon the record with a presumption of correctness as to the trial court's findings of fact, unless the evidence preponderates against those findings." ***Wood v. Starko***, 197 S.W.3d 255, 257 (Tenn. Ct. App. 2006). Although the Davises correctly articulate the preponderance standard, they appear to be improperly asking this court to consider, in our preponderance analysis, evidence that was not offered at trial. "We are an appellate court. We do not receive new evidence on appeal." ***PST Vans, Inc. v. Reed***, No. E1999-01963-COA-R3-CV, 1999 WL 1273517, *7 (Tenn. Ct. App. E.S., filed December 28, 1999). The Davises make reference to a deposition of Mr. Bruce that was taken in February 2005, almost two

[3] Only the "0.42 acre" figure directly appears in the record. The other acreages stated are the court's estimates, based on a comparison of the Crutchfield and Bruce survey maps, both of which are in the record, and both of which use the same scale. The court's estimates are not intended to be exact, and they have no bearing on the outcome of the case. They are provided simply for the reader's reference and ease of understanding.

[4] The Davises' brief reflects an additional basis for appeal, namely that the county was a necessary party and therefore a new trial should be ordered. However, the Davises did not attempt to join the county before trial and acknowledged at oral argument that the county was not a necessary party.

months before trial. This deposition was not introduced at trial and was not used to impeach Mr. Bruce during his testimony. Nevertheless, the Davises attached the deposition to, and referenced it extensively in, their motion to amend the judgment or for a new trial. The trial court correctly refused to consider it. "[E]vidence that was available at trial, but [that] . . . counsel at that time chose not to use . . . is not 'newly discovered evidence' as is required to warrant a new trial under Tenn. R.App. P. Rule 59.04." ***Bowser v. Bowser***, No. M2001-01215-COA-R3CV, 2003 WL 1542148, *18 (Tenn. Ct. App. M.S., filed March 26, 2003).

The post-judgment motion's reliance on the Bruce deposition is revived on appeal. The Davises state that the motion "pointed out that the survey by John David Bruce . . . was the product of deception by the surveyor and thus constituted a fraud upon the trial court." That allegation in the motion below was based on the contents of the Bruce deposition. Moreover, although the Davises do not cite directly to the deposition in their brief on appeal, they do reference an incident in which Mr. Bruce, during his deposition, allegedly "withdrew" the survey map that apparently became what is known in this case as the Bruce survey, or Exhibit 18.[5] They argue: "Given that Bruce withdrew the survey that he had done for the Cuels, the accuracy and authenticity of what was admitted as Exhibit 18 at trial is seriously compromised." The only actual evidence in the record of this purported "withdrawal" is a passing statement by the other surveyor, Mr. Crutchfield, that "[d]uring the course of Mr. Bruce's deposition, he withdrew that map and said that he needed to make some changes or corrections to it." Neither side pursued this point, and Mr. Bruce, who testified immediately after Mr. Crutchfield, was not asked about it. It seems clear that Mr. Crutchfield's passing mention of the alleged "withdrawal" was not considered an important piece of testimony at the time it was given. If the Davises intended to rest their case on this alleged incident, they should have offered the deposition as evidence and questioned the deponent about it. As they failed to do so, we certainly cannot say that the evidence preponderates against the trial court's decision to essentially disregard this detail. A snippet of unpursued, uncorroborated evidence does not a preponderance make, particularly when it involves something that happened during a pretrial deposition that could have been offered at trial but was not. If the Davises, by referencing the deposition, are inviting us to revisit this piece of non-evidence, which they improperly attached to their earlier motion, and base our decision in part on its contents, we must decline the invitation.

Disregarding the deposition, we find no merit in the Davises' claim that the evidence preponderates against the trial court's findings. The Davises note that the Bruce survey contradicts

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[5] The record is somewhat confusing with regard to whether the "withdrawn" map is the same as Exhibit 18. The Davises' brief equates the "withdrawn" map with a "working schematic" that Mr. Bruce referenced at trial, which he testified was "one of those documents that we had at depositions." The Davises seem to be asserting that the "working schematic" and Exhibit 18 are one and the same, and that both are the same map that was "withdrawn" at deposition. However, it appears to us from reviewing the transcript of Mr. Bruce's testimony that the "working schematic," which he described as having the Cuel property marked in magenta and the Davis property marked in green, was never offered into evidence, and that Exhibit 18 – which contains no green marks – is the actual survey map, not a mere "working schematic." On its face, Exhibit 18 is described as a "survey." Whether the map that Mr. Bruce allegedly "withdrew" at his deposition was the "working schematic," the Exhibit 18 survey map, or some other map, is difficult to ascertain from the record. However, we will assume for the sake of argument that the Davises are correct that Exhibit 18 itself, or a map identical to it, was the one allegedly "withdrawn" at Mr. Bruce's deposition.

four earlier surveys, including Mr. Crutchfield's, which all showed the boundary line at the same place. However, as noted earlier, Mr. Bruce testified that his was a "virgin" survey, and the court was entitled to credit it over the prior, non-virgin surveys; the *number* of previous surveys reaching a contrary conclusion certainly does not create a preponderance where those earlier surveys were, according to testimony that the court was entitled to accept, all built upon one another. Similarly, it is not dispositive that the parties' own deeds lack any reference to the right-of-way that the Bruce survey defines as the boundary. The testimony indicated that Mr. Bruce relied on documents which pre-dated those deeds, including deeds that preceded them in the chains of title. The court was entitled to believe that the "virgin" Bruce survey, based in part on early deeds and tax maps that Mr. Crutchfield did not consider, more accurately describes the boundary in question than the Crutchfield "retracing" survey does.

More broadly, the Davises attempt to cast doubt upon the trial court's findings by questioning Mr. Bruce's methods and implying that the Cuels acted in bad faith when they hired Mr. Bruce "to produce a survey map favorable to them." These arguments go to credibility, and in that arena the trial court's discretion is at its zenith. "The trial court is uniquely positioned to observe the manner and demeanor of witnesses, and so appellate courts accord particular deference to trial court findings that depend upon weighing the value or credibility of competing oral testimony." ***Fell v. Rambo***, 36 S.W.3d 837, 846 (Tenn. Ct. App. 2000).

In sum, our review of the record convinces us that the evidence does not preponderate against the trial court's decision to adopt the Bruce survey and divide up the property accordingly.

III.

The Davises also contend that the trial court erred by failing to consider the theories of easement by estoppel and boundary by acquiescence, and that it erred again by failing to amend the judgment or grant a new trial on these bases. The Cuels correctly point out that the Davises did not plead these theories in their complaint and did not mention the theories by name at trial. It is a "well-settled doctrine in this state that a party on appeal will not be permitted to depart from the theory on which the case was tried in the lower court." ***Tops Bar-B-Q, Inc. v. Stringer,*** 582 S.W.2d 756, 758 (Tenn. Ct. App. 1977). "As a general rule, 'questions not raised in the trial court will not be entertained on appeal.'" ***City of Cookeville ex rel. Cookeville Res'l Med. Ctr. v. Humphrey***, 126 S.W.3d 897, 905-06 (Tenn. 2004) (quoting ***Lawrence v. Stanford***, 655 S.W.2d 927, 929 (Tenn. 1983)). However, an unpled theory of recovery may be argued on appeal if it was tried by implied consent under Tenn. R. Civ. P. 15.02. The test for implied consent is not whether the theory was mentioned by name; rather, it is whether the proof presented at trial included "evidence . . . which appears to be relevant only as to this unpled issue." ***Pressnell v. Hixon***, No. E2002-01150-COA-R3-CV, 2004 WL 2039844, at *3 (Tenn. Ct. App. E.S., filed September 14, 2004). *See also* ***Zack Cheek Builders, Inc. v. McLeod***, 597 S.W.2d 888, 890-91 (Tenn. 1980). Although the Davises did not specifically mention the theory of implied consent in their brief, we will briefly consider their alternative theories, assuming for the sake of argument that those theories

were indeed tried by implied consent. As will be seen, our ruling will pretermit an actual holding on whether implied consent in fact existed.

As the Davises note in their brief, a boundary may be established by acquiescence where "recognition and acquiescence [are] mutual, and both parties . . . have knowledge of the existence of a line as a boundary line." ***Duren v. Spears***, 1990 WL 59396, *2 (Tenn. Ct. App. W.S., filed May 10, 1990) (quoting 11 C.J.S., *Boundaries*, §§ 79 and 81 (1973)). Although "what constitutes acquiescence must be decided from the particular facts of the case," in general "it depends on the acts or declarations of the parties interested, on inferences or presumptions from their conduct, or on their silence." ***Id.***

Because the trial court did not make a finding on this particular issue, there is nothing for us to presume the correctness of, so we must "conduct our own independent review of the record to determine where the preponderance of the evidence lies." ***Crabtree v. Crabtree***, 16 S.W.3d 356, 360 (Tenn. 2000). Having done this, we find that the evidence does not support a finding that a boundary was established by acquiescence. On the contrary, there is considerable evidence of an ongoing dispute over the past two decades as to the proper location of the boundary line. The skirmishes may have been intermittent, but at no point could it be said that the parties had reached any sort of agreement. The fact that the Cuels briefly had a fence on the middle line, between the northern and southern disputed areas, is not enough to establish that they acquiesced in setting that line as the boundary. Perhaps if the fence had stayed there for a lengthy period of time, and if both parties had acted as though they regarded it as the correct boundary, a boundary by acquiescence might have been created. Those, however, are not the facts here. Nor can we say that the Cuels acquiesced simply by failing to more vigorously dispute the earlier surveys prior to this litigation. The countervailing evidence of an ongoing dispute is sufficient that, *in toto*, the evidence preponderates against the Davises' contention that a boundary was created by acquiescence, either at the southernmost line or at the middle line.

The Davises' other alternative theory, easement by estoppel, is equally unavailing. The Davises' brief cites ***Callahan v. Town of Middleton***, 292 S.W.2d 501, 508 (Tenn. Ct. App. 1954), for the elements of estoppel:

> The essential elements of an equitable estoppel as related to the party estopped are said to be (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) Intention, or at least expectation that such conduct shall be acted upon by the other party; (3) Knowledge, actual or constructive of the real facts. As related to the party claiming the estoppel they are (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) Reliance upon the conduct of the party

> estopped; and (3) Action based thereon of such a character as to change his position prejudicially[.]

The Davises claim that the Cuels accepted, even while disagreeing with, the earlier surveys that established the middle line as the boundary, and thus should now be estopped to deny the validity of that boundary line. Again, in the absence of a factual finding on this issue, we have conducted our own independent review of the record to determine where the preponderance lies. We find that, even if the Davises could establish some of the required elements of estoppel, their argument would still fail because the record clearly does not support a finding that the Davises relied upon the Cuels' alleged conduct, let alone that they changed their position prejudicially on the basis of said reliance.

The only examples of purported reliance offered in the Davises' brief are the construction of their house, the construction of a leach bed for their septic system, and the fact that they mowed the lawn in the disputed areas "and otherwise maintained it." The construction of the house is irrelevant because it is on the county right-of-way, not on the tracts of land that are disputed between these parties, and the Cuels conceded at trial that they would be estopped from claiming any portion of the right-of-way should the county formally abandon it. As for the septic system, it is unclear to this court whether the leach bed is located on the right-of-way or on the disputed land now owned by the Cuels. However, to whatever extent that the leach bed may be on the Cuels' land, the Cuels have already conceded that the Davises have an easement to continue using it, "since it's there." No further action is required on this issue, and certainly the existence of a leach bed on a small portion of disputed land does not justify the creation of an easement for the entire area. As for the argument that the Davises demonstrated reliance by mowing the lawn, it merits little discussion. Put simply, the fact that the Davises may have sometimes mowed the Cuels' lawn cannot and does not constitute a prejudicial change in the Davises' position so as to justify creating an easement by estoppel. This argument is without merit.

IV.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellants Ralph Davis and Jackie Davis. We remand to the trial court for enforcement of that court's judgment and for the collection of costs assessed below, all pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE