IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 18, 2007 Session

JAMES O. OVERTON, ET AL. v. TERRY L. DAVIS, ET AL.

Appeal from the Chancery Court for Anderson County
No. 04CH 4344 William E. Lantrip, Chancellor

No. E2006-01879-COA-R3-CV - FILED NOVEMBER 29, 2007

Landowners brought action against adjacent neighbors to establish boundary line. Following a bench trial, the court held that each side is entitled to approximately half of the disputed area. Landowners appeal from the trial court's resolution of the boundary dispute. The neighbors agree with landowners' assertion that the evidence does not support the line found by the trial court. The judgment of the trial court is vacated. This case is remanded for further proceedings.

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

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J, joined.

Philip R. Crye, Jr., Clinton, Tennessee, for the appellants, James O. Overton and Betty Overton

John E. McDonald, Oak Ridge, Tennessee, for the appellees, Terry L. Davis and Kimberly J. Davis

OPINION

I.

The plaintiffs, James O. Overton and Betty Overton, seek to establish their common boundary line with the defendants, Terry L. Davis and Kimberly J. Davis. On this appeal, both sides agree that the chancellor erred in setting the boundary line along a cattle fence. They argue that the undisputed proof shows that the fence was never intended to be a boundary fence.

After determining that the surveys of the parties did not locate the subject boundary line, the trial court ordered that the boundary "shall be located and fixed along the line shown on Trial Exhibit 6 . . . and identified as the Overton fence running from the railroad right-of-way to the road." The court further ordered that

> [a]ll right, title and interest of the Plaintiffs in and to any part of the property in conflict generally lying on the north (the Defendants') side of the line, both in law and equity, shall be, and the same hereby is divested from the Plaintiffs and vested in the Defendants; . . . [and that] . . .
>
> [a]ll right, title and interest of the Defendants, if any, in and to the property lying on the south (the Plaintiffs') side of the line, both in law and equity, shall be, and the same hereby is divested from them, and each of them, and the same shall be and the same hereby is vested in the Plaintiffs . . . .

In his written opinion, the trial judge elaborated as follows:

> Because I believe that the reservation mentioned [in] the Overton deed has to be given some significance[,] I believe that the boundary described in the Peterson survey is not the boundary because of the reservation and also the failure of the maker to describe the line as the Old Mill Road from the railroad right of way.
>
> While parol evidence is admissible to help locate these historic boundaries, I find the testimony of Frank Patt to be unconvincing in light of all the conflicting testimony. I believe that surveyor Easter found his line based upon the Frank Patt description[.] It is my opinion that the boundary between these two parcels is the line shown on trial exhibit 6 identified as the Overton fence running from the railroad right of way to the road. This line essentially divides the disputed property and gives effect to be, [sic] the reservation found in the Overton deeds.

For the orientation of the reader, the relevant portion of the survey of William R. Easter is attached as an appendix to this opinion.

II.

This case was tried without a jury. Review of such a case 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. *See* Tenn. R. App. P. 13(d); ***Boarman v. Jaynes***, 109 S.W.3d 286, 289-90 (Tenn. 2003). No presumption of correctness attaches to the trial court's conclusions of law. *See* ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996). In a reported case involving a boundary line dispute, this court described the standard of review as follows:

> Our review is de novo upon the record of the trial court and the parties are entitled to re-examination of the whole matter of law and fact appearing in the record. Where the evidence preponderates against the finding of the chancellor, it is our duty to enter such decree as the law and evidence warrant.

Thornburg v. Chase, 606 S.W.2d 672, 675 (Tenn. Ct. App. 1980).

As pertinent to the issue before us, the following rule has been adopted in Tennessee:

> The construction of deeds and other instruments and documents and their legal effect as to boundaries is a question of law. What boundaries the grant or deed refers to is a question of law; where those boundaries are located on the face of the earth is a question of fact. If, therefore, the evidence concerning the location of the true boundary line between adjacent owners is conflicting, that issue is one of fact unless the legal construction of the deed or grant is such that the boundary is determined as a matter of law.

12 Am. Jur.2d *Boundaries* § 121 at 515 (1997) (footnotes omitted); *see also* ***Mitchell v. Chance***, 149 S.W.3d 40, 45 (Tenn. Ct. App. 2004).

In construing a deed, the court must "ascertain the grantor's intent from the words of the deed as a whole and from the surrounding circumstances." ***Griffis v. Davidson County Metro. Gov.***, 164 S.W.3d 267, 274 (Tenn. 2005). It is "the duty of the court to construe a deed, if possible, to give effect to its several parts and avoid rejecting any of its provisions, the presumption being that the parties intended every part of the deed to have some meaning." ***Quarles v. Arthur***, 231 S.W.2d 589, 590 (Tenn. Ct. App. 1950). The interpretation of a deed is a question of law. ***Mitchell***, 149 S.W.3d at 45. The trial court's interpretation of the deed, being a question of law, is accorded no presumption of correctness. ***Id.***

"In determining disputed boundaries, resort is to be had first to natural objects or landmarks, because of their very permanent character; next, to artificial monuments or marks, then to the boundary lines of adjacent landowners, and then to courses and distances." ***Thornburg***, 606 S.W.2d at 675. Natural monuments are objects occurring in nature, such as mountains, rivers, and streams. *See* ***Ayers v. Watson***, 137 U.S. 584, 11 S.Ct. 201, 204, 34 L.Ed. 803 (1891). When called for in a deed, such things as trees, paths, and fords are also considered natural monuments. ***Sheffield v. Franklin***, 222 S.W.2d 974, 979 (Tenn. Ct. App. 1947). As noted in ***Pritchard v. Rebori***, 186 S.W.121 (Tenn. 1916),

> [t]he object in all boundary questions is to find, as nearly as may be, certain evidences of what particular land was meant to be included for conveyance. The natural presumption is that the conveyance is made

> after and with reference to an actual view of the premises by the parties to the instrument. The reason why a monument or adjacent line is ordinarily given preference over courses and distances is that the parties so presumed to have examined the property have, in viewing the premises, taken note of the monument or line.

Id. at 123.

III.

The Overtons assert ownership of approximately 206.42 acres in Anderson County. They argue that the hillside property claimed by the Davises overlaps and encroaches upon the Overtons' property. The area of the alleged encroachment, wooded and sloping downhill, is approximately 6.84 acres.

In an earlier deed in the Overton chain of title, the deed from O.L. Harrington and wife, Lucinda Harrington, to S.C. Yarnell and R.M. Yarnell, dated November 19, 1921, the disputed line is described as follows: "Beginning on a stake at the Southern Railroad, John France's [sic] corner, then with John France's [sic] line S.E. to a stone at the old Mill road . . . ." No acreage or amount of land is stated in the Harrington deed, and no other description of the disputed line appears in the Overton chain of title. Additionally, in the Harrington deed, "there is reserved by parties of the first part . . . a road as now used from the mouth of the culvert on said railroad to the beginning corner[.] . . ."

In an earlier deed in the Davis chain of title, the deed from R.D.H. Yarnell and wife, Anna Yarnell, to John Franse and wife, Alice Franse (incorrectly spelled France in the deed), dated March 23, 1915, the disputed line is described as follows: "a corner in said Harrington's line from thence North West with Harringtons [sic] line to a corner in said line on the Southern Rail Road [sic] Right-of-Way . . . ." The Yarnell to Franse deed conveys 35 acres, more or less. The fact that the number of acres conveyed is stated in the deed can be significant, for the rule is that a call for quantity may sometimes be resorted to for the purpose of locating and identifying land. ***Sheffield***, 222 S.W.2d at 978. "The rule of law is well settled that the call for quantity may be resorted to for the purpose of making that certain which otherwise would be uncertain." ***Phoenix Mut. Life Ins. Co. v. Kingston Bank & Trust Co.***, 112 S.W.2d 381, 383 (Tenn. 1938) (quoting ***Bynum v. McDowell***, 3 Tenn. App. 340, 351 (1926)).

Neither the Harrington nor the Yarnell deed makes reference to any natural monuments, unless the "Old Mill Road" is considered a natural monument. The Yarnell deed makes no reference to any artificial monuments. The Harrington deed refers to "a stake at the Southern Railroad, John

France's [sic] corner" and "a stone at the old Mill Road." The stake in the right-of-way of the railroad[1] and the stone monument at the Old Mill Road can no longer be located.

The disputed boundary was surveyed for the Overtons by William R. Easter. It was stipulated at trial that Mr. Easter is a licensed Tennessee surveyor. The Easter survey of the line at issue reflects one natural monument, a 24-inch oak tree in the vicinity of a dump site, and one artificial monument, a two-inch iron pipe that resembles an axle from a Ford Model A automobile, both pointed out to Mr. Easter by Frank Patt, son of a prior owner of the Davises' property.

In an attempt to reconstruct the location of the beginning corner of the Harrington deed, Mr. Easter ran a straight line between the two-inch iron pipe and the oak tree and then extended it, setting a pin on the railroad right-of-way. Mr. Easter then extended the line from the oak tree to the agreed location of the Old Mill Road, coming out near an existing iron pin in the center of the road. Mr. Easter admitted, however, that he had "no idea" where the existing iron pin in the Old Mill Road came from. It was suggested by a witness at trial that a previous survey of the property had been performed at the request of Alma Yarnell Bell, a predecessor in title, and that the surveyor hired by her had set the iron pins found in the center of the Old Mill Road. The preexisting iron pin located by Easter was argued to be the "stone" corner called for in the Harrington deed.

Mr. Easter further testified that the box culvert discussed in the Harrington deed is located in the same place today as it was on a 1921 map. He therefore ran his boundary line to the east of the culvert because of the reservation of the easement in the deed. Mr. Easter explained that the reservation is significant in that the disputed boundary line had to lie north and east of the culvert to give the clause any meaning.

Mr. Patt testified that his family had farmed the property in question back in the 1930s. He indicated that his father, Maynard Patt, had pointed out the pipe to him and had identified it as a line marker.[2] He admitted that he did not know who had placed the axle there or for what purpose. Mr. Patt stated that the Patt family had created the dump site in the vicinity of the 24-inch oak tree in the late 1930s as a place to dispose of household glass and tin cans. He explained that the dump site was located on or almost on the disputed boundary line. When asked at trial to identify a photograph of the oak tree, however, Mr. Patt testified that he could not identify it by the photograph because he could not "swear to a tree that is out in the middle of the woods."

Mr. Patt further indicated that "probably" in the 1970s, he and his son, Tim, had constructed a cattle fence on the Patt side (northeast of the disputed line) when they rented the property from Mr. Patt's brother, John, who had purchased the property from their father in 1959. Mr. Patt recalled that the Patt cattle fence was constructed around the cleared area or field where he and his son kept cattle

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[1]The Overtons assert that the stake was destroyed by U.S. Sprint when that firm laid a fiber optic cable in the railroad easement.

[2]Mr. Easter explained that axles were "used a lot in the thirties and forties when the Model A's were going out . . . [and that surveyors] would use axles out of these Model A vehicles as a boundary tool."

and was approximately 100 feet or more from where he believed the boundary line to be. Mr. Patt noted that Mr. Overton constructed his cattle fence, around the same time, at a point to the southwest of the boundary line, which ran between the two livestock barriers.

The Overtons assert that the Easter survey is the best evidence in the record of the disputed line. They argue that Mr. Easter properly relied upon the parol evidence provided by Mr. Patt to reconstruct the line called for in the deeds. The Overtons further contend that Mr. Easter appropriately considered the objects located as circumstantial evidence of the location of the true boundary line.

On the contrary, the Davises argue that Mr. Easter improperly based his entire survey upon the parol evidence provided by Mr. Patt. According to the Davises, the axle monument could not have been intended to locate the John Franse corner because it is more than 139 feet from the railroad right-of-way. They also note that there is no evidence of any written agreement establishing the axle monument as a boundary line marker. Furthermore, they point out that the axle is not called for in either deed at issue. The Davises contend that in order for a monument to be controlling in establishing the boundary of property conveyed by a deed or grant, it must be shown that the monuments of boundary were in existence at the time of the execution of the deed or grant. *See* ***Martin v. Nance***, 40 Tenn. 649, 650 (1859). The Yarnell to Franse deed in the Davis chain of title was executed on March 23, 1915, and the Harrington deed in the Overton chain of title was executed on November 19, 1921. The Davises therefore assert that both the Yarnell deed and the Harrington deed were executed long before the 1930s or 1940s when Model A axles were commonly used as boundary markers. The Davises further contend that Mr. Easter's proposed line fails when the oak tree is disregarded due to Mr. Patt's inability to identify it at trial with any reasonable degree of certainty.

The Davises also note that there is nothing in the record to suggest that anyone ever intended for the place where the Patts arbitrarily chose to dump their garbage to become a boundary monument. "It is well settled that parties owning adjoining lands may by agreement establish a boundary line between their lands where there is no certain and established line known to them." ***Winborn v. Alexander***, 279 S.W.2d 718, 726 (Tenn. Ct. App. 1955) (quoting ***Rogers v. S.W. Taylor & Co.***, 2 Tenn. App. 445, 450 (1926)). In this case, however, there is no evidence of any such agreement between any owners regarding the dump site, and there is no evidence that the boundary line was in any way disputed at the time the dump site was in use.

The Davises further argue that the preexisting iron pin found was not the stone monument at the Old Mill Road called for in the Harrington deed and the purpose of the iron pin found was never established. They note that the iron pin located was not described in either the Harrington deed or the Yarnell deed to the Franses and was likely not in existence at the time of the execution of either deed.

Noel M. Peterson prepared the survey for the property that was later purchased by the Davises.[3] Like in the case of Mr. Easter, it was stipulated at trial that Mr. Peterson is a licensed Tennessee surveyor. Because the description in the Yarnell deed had "no calls," Mr. Peterson, according to him, was forced to review the description of the adjoining deed, *i.e.*, the 1921 Harrington deed. He noted that after inspecting the property, he could find neither the wooden stake that had been set at the railroad back in 1915 nor the stone in the Old Mill Road. As the parties do not dispute that the Old Mill Road bed constitutes the boundary line closer to the top of Chestnut Ridge, Mr. Peterson attempted to reconstruct the Harrington line backwards by following the old road bed from the top of the ridge. Additionally, since the Old Mill Road was called for in the Harrington deed, Mr. Peterson considered it to be a natural monument.

In retracing the road bed, Mr. Peterson noticed remnants of fence wire in trees and along the ground and began to follow it. He testified that he followed the fence remnants all the way down the road bed to the foot of the hill where the road bed disappeared. He then continued to follow fence remnants to the railroad. Mr. Peterson concluded that the fence remnants were the best evidence of the location of the boundary "because it was coincident with the boundary that I was following, which is the road bed and when the road is no longer visible, and I'm still seeing the same type of fence and able to follow it, that indicated to me that it was a good possibility that the boundary continued with the same fence." He surveyed the old fence line from the railroad right-of-way to the edge of the Old Mill Road, which was virtually a straight line.

When Mr. Peterson completed his survey based upon the reconstruction of the location of the Old Mill Road and the fence along its boundary, he discovered that his survey contained 29.83 acres. He noted that the 1915 deed from Yarnell to Franse conveyed approximately 35 acres. The total acreage of the tract remained intact until Jim and Marlene Mills conveyed 5 acres to Tom and Marla Myers, after which there should have been approximately 30 acres remaining. Mr. Peterson therefore opined that the acreage he found supported the conclusion that he had located the true boundary line. Adopting the Easter survey, on the other hand, would reduce the Davis property from 29.83 acres to 22.98 acres.

Lola Patt, the widow of John Patt and the oldest living former owner of the property, testified by deposition that when she and her husband owned the property, the boundary line was on the Old Mill Road. Mrs. Patt indicated that she had been to the property since the Easter survey had been performed and had observed the red spots Mr. Easter had painted on the trees to mark what he believed to be the boundary line. The Easter line as noted by the red spots, however, was, according to Mrs. Patt, "too close" to the Davises' house and should be "way on down there," meaning down the hill from the Davises' house toward the Overtons' property. Mrs. Patt maintained that the boundary line followed the Old Mill Road "on down in there" to a two-inch stake. At the stake, "you turn right" and "go on down to the railroad." Unfortunately, Mrs. Patt was unable to locate the two-inch stake.

[3] Mr. Peterson was hired by Jim Mills, the owner of the property at the time.

As it relates to the Easter survey, the trial judge found that the testimony of Mrs. Patt refuted the testimony of Mr. Patt as to the location of the boundary line. The judge further concluded that "the testimony of Frank Patt [was] unconvincing in light of all the conflicting testimony." The Peterson survey was discounted by the trial judge because of "the failure of the maker [of the Harrington deed] to describe the line of the Old Mill Road from the railroad right of way."

The Overtons assert that the Harrington deed description does not indicate that the line follows either a fence or the old road to the railroad. Instead, the description says it begins at a stake on the railroad right-of-way and runs thence southeast to a stone at the Old Mill Road, and then follows the road to the top of the ridge. They argue that Mr. Peterson essentially treated the fence as a monument, even though the deed did not call for it. The Overtons further note that no witness testified that the fence Mr. Peterson followed was ever intended to be a boundary fence.

As to the fence found by the trial court to be the true boundary line, Mr. Overton testified that he had put the fence up as a "temporary fence" and he had just strung the fence wire "anywhere" to keep his cattle separated from the Patts' cattle. The Davises agree that there is no evidence that the cattle fence was ever intended to be a boundary monument.

The general rule provides that a fence may serve as a monument when called for in the deed, but a fence that is neither called for as a monument in the deed, nor erected to conform to a surveyed line, will not be treated as a monument. *See* 12 Am. Jur. 2d *Boundaries* § 69 at 472 (1997). The fence line Mr. Peterson reconstructed in his survey is not called for in either the Harrington deed or the Yarnell deed. The significance to be placed upon a fence has been stated as follows:

> Whether a fence will constitute a boundary will depend on the intention of the parties and the significance they attach to the fence rather than its location or condition. The parties must intend the fence to establish the boundary and not serve as a mere barrier. A fence may be maintained between adjoining proprietors for the sake of convenience merely, and without intention of thereby fixing boundaries, in which case mere acquiescence by adjoining land owners in its existence and the occupancy of the land on either side of it do not, in themselves, constitute proof that the fence is on the accepted boundary line so as to constitute a boundary. Thus agreement to or acquiescence in the establishment of the fence, not as a line marking the boundary, but as a line for other purposes, or acquiescence in the mere existence of the fence or in the fence as a mere barrier, does not preclude the parties from claiming up to the true boundary line.

12 Am. Jur.2d *Boundaries* § 90 at 490-91 (1997) (footnotes omitted). Further, the law presumes that a course between two points, such as "a stake at the Southern Railroad" to "a stone at the Old Mill Road," is intended to be a straight line. *See* ***Wright v. Hurst***, 127 S.W. 701, 703 (Tenn. 1910); *see*

also 12 Am. Jur.2d *Boundaries* § 52 at 459 (1997). Under this rule, a proper construction of the disputed line as described in the Harrington deed is that it is a straight line running along a southeast course from the railroad to the Old Mill Road. Contrary to the straight line called for in the Harrington deed, the arbitrary fence line that the trial judge adopted as the boundary is an extremely crooked line that meanders in numerous directions between the railroad and the location of the old road.

As noted in ***Wood v. Starko***, 197 S.W.3d 255, 260 (Tenn. Ct. App. 2006),

> the question to be answered is not where new and modern survey methods will place the boundaries, but where did the original plat locate them. The main purpose of a resurvey is to rediscover the boundaries according to the plat upon the best evidence obtainable and to retrace the boundary lines laid down in the plat. . . . [T]he known monuments and boundaries of the original plat take precedence over other evidence and are of greater weight than other evidence of the boundaries not based on the original monuments and boundaries.

Id. at 260 (quoting ***Staaf v. Bilder***, 415 P.2d 650, 652 (Wash. 1966) (citations omitted). Accordingly, we must conclude that the trial judge erred as a matter of law when he determined that the boundary line was located along the cattle fence constructed by Mr. Overton. No evidence in the record supports a conclusion that the cattle fence represents the original boundary of the property. As previously noted, one thing that both sides agree on is that the Overton fence – the one found by the trial court to be the boundary line – was never intended to be a boundary line.

The trial judge did properly find that by locating the boundary line to the west of the culvert, the Peterson survey disregarded the reservation in the Harrington deed. Indeed, the reservation is rendered meaningless by the location of the boundary line as set by Mr. Peterson, as it would mean that the Harringtons owned no land around the culvert in question at the time of the conveyance. We agree with the trial court that the Peterson survey is not sustained by the evidence.

The Davises assert that the trial judge gave undue weight to the reservation. They contend that there is no proof in the record as to the location of any railroad culvert in 1921 when the Harrington deed was executed. The Davises contend that the existing culvert is basically a hole in the ground, some two and a half feet square for drainage under a mound of dirt built up for the railroad track. They note that it is impossible for a person or vehicle to pass through the culvert. They argue there is no evidence in the record of any road ever existing that went to or from the mouth of the present culvert from any direction whatsoever, much less evidence as to the exact course of the road that would require the easement in the Harrington deed. The Davises claim there is no evidence regarding the location, course, or purpose of the unidentified road "as now used" in 1921. The Overtons assert, however, that they have engineering drawings from the railroad that

show the culvert in the same location in 1921 and that no other culverts are located in this particular area on the railroad.

Because of the reservation of the easement to the culvert, the trial court correctly found that the location of the Harrington line had to be northeast of the line set on the Peterson survey. Thus, as to this issue, the trial court properly gave effect to the language in the Harrington deed.

"Where monuments or marks called for in a deed or a grant are lost or otherwise uncertain, they must be established by the best evidence of which the nature of the situation is susceptible. In consequence their location may be proved by parol evidence, the admission of such testimony not being in contravention of the statute of frauds." 11 C.J.S. *Boundaries* § 112 at 206 (1995) (footnotes omitted).

The original deed in question did not indicate that any fence established the boundary. Nor does the Harrington deed state that the Old Mill Road constituted the boundary at the disputed point along the line, thus refuting the testimony of Mrs. Patt.[4] While Mrs. Patt claimed that the Easter line was incorrect, she was unable to describe the appropriate location of the true boundary. The Overton cattle fence was clearly never intended to be a boundary fence. The best evidence presented to the trial court was provided by Mr. Patt, who testified live in the courtroom that the boundary was not the Overton fence, which was way below or to the southwest of the boundary line, and that the Patt cattle fence was approximately 100 feet northeast of the boundary line.[5] We hold that the evidence preponderates in favor of a finding that the Easter survey is the best evidence available. We reach this preponderance determination even in the face of the trial court's finding that Mr. Patt's testimony was "unconvincing." We do so because we hold that the *entirety* of the evidence supports our conclusion.

Lastly, the Davises assert that the Overtons should be estopped from attacking the Peterson survey because Mr. Overton, in effect, acquiesced in the survey when he did not express his objections to it earlier. Jim and Marlene Mills acquired what is now the Davises' property from Mrs. Patt on July 16, 1999. Mr. Mills had George A. McGrew, Jr. perform a survey of the property on October 29, 2001. After discussing the results of that survey with Mr. Overton, Mr. Mills concluded that the McGrew survey was not accurate. Thus, in 2001, he employed Mr. Peterson to conduct a second survey. Afterwards, Mr. Mills claimed that he was unsuccessful in his attempts to arrange meetings with Mr. Overton to discuss the survey. As a result, the Davises relied on the Peterson

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[4] Because Mrs. Patt testified by deposition, the appellate court is arguably in as good a position as the trial court to evaluate her credibility. *See* ***Krick v. City of Lawrenceburg***, 945 S.W.2d 709, 712 (Tenn. 1997). When reviewing testimony by depositions "appellate courts may make an independent assessment of the credibility of the documentary proof [they] review without affording deference to the trial court's findings." ***Wells v. Tennessee Bd. of Regents***, 9 S.W.3d 779, 783-84 (Tenn. 1999).

[5] We acknowledge that parol evidence should not be admitted for the purpose of substituting a different monument for one clearly called for by a deed, as such action would violate the rule that written contracts may not be contradicted nor modified by oral evidence. 11 C.J.S. *Boundaries* § 122 (1995).

survey when they purchased the property on June 7, 2002. The Davises constructed a home that is apparently approximately 200 feet from the boundary as determined by Mr. Easter. According to the Davises, approximately six months after the Davises purchased the property, Mr. Overton called to opine that there was a problem with the line, but it was not until late January 2004 that he obtained a survey and July 29, 2004, before he filed this action. The Davises contend that the trial judge erred in disregarding their defense that Mr. Overton was estopped to deny the Peterson survey. They claim to be innocent purchasers for value, without any knowledge of the Overtons' claim that the boundary line was wrong. The Davises contend that, but for the Overtons' long delay in having their survey made and/or making it known that they disputed the Peterson survey, they, the Davises, would not have relied upon the Peterson survey to their detriment. The Overtons respond that they did not consent to and were unaware of the Peterson survey. They argue that they cannot be estopped to deny the accuracy of the survey.

The trial court made no findings as to these competing contentions, apparently determining that the Davises had failed to establish a cause of action for detrimental reliance, also known as promissory estoppel. Based on the record before us that reveals no representations or promises to the Davises by the Overtons, we find no basis to question the action of the trial court. "The key element in finding promissory estoppel is, of course, the promise." ***Amacher v. Brown-Forman Corp.***, 826 S.W.2d 480, 482 (Tenn. Ct. App. 1991).

IV.

This case is remanded to the trial court with instructions to adopt a boundary line more consistent with the best evidence available, *i.e.*, the Easter survey.

V.

The judgment of the trial court identifying the boundary line between the parties is hereby vacated and this case is remanded to the trial court for further proceedings. The costs of this appeal are taxed 50% to the Overtons and 50% to the Davises.

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CHARLES D. SUSANO, JR., JUDGE