IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
October 29, 2007 Session

CONNIE R. (DAVIS) PHILLIPS, ET AL., V. LAWRENCE WOODS, ET AL.

Appeal from the Chancery Court for Morgan County
No. 05-56 Frank V. Williams, III, Chancellor

No. E2007-00697-COA-R3-CV - FILED MARCH 31, 2008

This appeal involves a dispute over a boundary line and the ownership of a driveway.[1] The plaintiffs, Connie R. (Davis) Phillips and Carol J. (Davis) Miller ("the plaintiffs" or "the Davis heirs"), and the defendants, Lawrence Woods and Charlotte Woods ("the defendants" or "the Woods"), own adjacent tracts of real property in Morgan County. When the initial complaint was filed, the northern tract of property was owned by the plaintiffs' mother, Stella Davis ("Mrs. Davis"), who had filed suit against the Woods, the owners of the southern tract, to quiet title, to establish the common boundary line, and for libel of title. After Mrs. Davis' death prior to trial, her daughters were substituted as plaintiffs. Upon the conclusion of a bench trial, the trial court found, *inter alia*, that the Davis heirs owned the property over which the driveway ran, but that the defendants retained an easement by necessity in the roadway, and that the Woods had committed libel of title. While the trial court agreed with the common boundary line described by the surveyor for the Davis heirs, the court reformed the boundary between the parties upon finding that the defendants were entitled to a portion of the Davis property as a result of adversely possessing it for over 30 years. The Woods appeal. We affirm. Case remanded for further proceedings.

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

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Wade M. Boswell, Knoxville, Tennessee, for the appellants, Lawrence Woods and Charlotte Woods.

Philip R. Crye, Jr., Clinton, Tennessee, for the appellees, Connie R. (Davis) Phillips and Carol J. (Davis) Miller.

---

[1] To assist the reader, and to illustrate, generally, the properties of the parties and the driveway at issue, we have attached an appendix to this opinion.

OPINION

I.

This dispute arose in April 2004, when Mrs. Davis gave permission to a neighbor, Jeremy Chadwick, owner of property to the east of her property and that of the Woods, to use the gravel driveway at issue for a means of ingress and egress to a new home he was constructing on his property. When the defendants learned that Mrs. Davis had authorized Mr. Chadwick to use the driveway, Mr. Woods became upset and consulted an attorney. The defendants' counsel subsequently sent a letter to Mr. Chadwick to advise him that he had no right to use the driveway. Mr. Woods also set up a meeting with Mrs. Davis and her sister, Lucy Sweat, to discuss the driveway. At some point, Mr. Woods offered Mrs. Davis $2,000 in return for a deed to the 15-foot wide strip of her property where the driveway is located. According to the testimony of Ms. Sweat, Mr. Woods made it clear that once Mrs. Davis signed the deed, he planned to exclude everyone from using the driveway, including Mrs. Davis' daughters, unless the defendants were paid for its use. Mrs. Davis declined to sell the driveway.

Around this same time, Mr. Woods obtained the services of a registered land surveyor, L. Eugene Olmstead, who completed a survey of the driveway on August 4, 2004. A general warranty deed was prepared utilizing the survey, wherein the Woods declared that they were the owners in fee simple of the driveway. The deed, from Lawrence Woods to Lawrence Woods and wife, Charlotte Woods, indicated that the driveway had been "exclusively, actually, adversely, continuously, openly and notoriously possessed by the parties hereto and their predecessors in interest for a period of time in excess of sixty (60) years." The deed was executed and recorded on August 31, 2004. Mr. Woods claimed that he undertook all these actions upon the advice of counsel.

Mrs. Davis had her property surveyed on November 8, 2004, by registered land surveyor Wade B. Nance. On May 6, 2005, Mrs. Davis filed a complaint for declaratory judgment to quiet title, to establish a boundary line, and for damages for libel of title. In her complaint, Mrs. Davis averred that the Woods, by recording the deed, had published false statements of ownership of the driveway, which they intended to constitute notice to the whole world, thereby committing libel of title. She further alleged that the Woods had encroached across her southern boundary line and had placed on the northern part of her property a water meter, a mailbox, and a "private property" sign. In her prayer for relief, Mrs. Davis requested that the trial court "declare that Defendants have a nonexclusive implied easement of necessity across the driveway for ingress and egress between Angel Lane and Defendants' property and further declare the relative rights of the parties with respect to the driveway."

The Woods, in their answer, stressed that the roadway to their land had been in existence for over 50 years and predated the 1955 deed to Mrs. Davis and her late husband, James Davis (collectively "the Davis"). The defendants contended that the roadway had been in the complete control of the Woods family since the 1940s and that they believed the actions of Noah Woods, their

predecessor in title, along with their acts, had resulted in their ownership of the driveway. Over the years, Mr. Woods had put a base on the road, graveled it, put power lines over it, and placed water and gas lines under it. At one time, Mr. Woods put up a gate, chained off the driveway to prevent other people from using it, and even had his attorney write third parties to advise them they could not utilize his driveway. Thus, the defendants argued that the deed only reflected what Mr. Woods and family members had believed was the truth. They denied that their use of the driveway was based upon the permission of the Davis or their predecessors in title.

On appeal, Mr. Woods asserts that he was not acting in reckless disregard of Mrs. Davis' rights because he genuinely thought that he owned the driveway or was entitled to it by adverse possession. The Woods indicate that counsel advised them to avoid a proceeding such as this by trying to obtain Mrs. Davis' signature on a document which would indicate the driveway belonged to the defendants. Mr. Woods claims the fact that he offered Mrs. Davis $2,000 to acknowledge that the driveway was his "had nothing to do with whether or not he thought he owned it but simply showed the pragmatic effect of trying to minimize the out-of-pocket expenditures that might be incurred in the future." According to Mr. Woods, the fact that the deed was recorded was not a blatant attempt to take what he had not been able to obtain by his cash offer, but was a means of attempting to establish what he thought he already had, *i.e.*, ownership of the driveway. Mr. Woods relies on the fact that the deed shows on its face that it was not prepared by Mr. Woods but by his attorney. He claims this bolsters his position that he was acting upon the advice of counsel.

The properties at issue came from a common owner, Haze Langley, who acquired title to the original 24-acre tract by a warranty deed dated October 8, 1917, from his mother, Mahala Justice. By a deed dated August 11, 1941, and recorded on January 21, 1946, Mr. Langley conveyed about 2 acres of his property to Grover Portwood. This deed to Mr. Portwood, which did not reserve an easement across the property for ingress and egress, was the first conveyance out of the initial tract and severed the remaining balance of Mr. Langley's property from its access to the county road. The property comprising Tract I of the Davis property is described in this deed.

In a deed dated December 24, 1945, and recorded on January 21, 1946, Mr. Langley next conveyed an approximately four-acre tract to Inman McPeters. Again, Mr. Langley did not reserve an easement across the property to and from the county road. The McPeters deed describes the same property comprising Tract 2 of the Davis property. Ultimately, the two tracts referenced above were purchased in August 1955 by Mr. and Mrs. Davis, and later became solely vested in Mrs. Davis by a warranty deed dated and recorded on September 11, 1965. Title to these tracts passed by intestate succession to Mrs. Davis' daughters on July 20, 2005, upon the death of Mrs. Davis.

By deed dated March 1, 1947, and recorded on May 17, 1947, Mr. Langley conveyed another eight acres to Mr. Portwood, who conveyed the tract one year later to Noah Woods, the predecessor in title to the defendants. The means of ingress and egress to the properties severed from the original 24-acre tract and lacking access to the county road was over a rutted dirt lane. The properties were used to grow crops. The location and width of the driveway has not changed over the years.

In July 1970, Noah Woods conveyed a half-acre tract to his son and daughter-in-law, the Woods. According to the defendants, because the surveyor, Gordon Wilson, was unable to locate a monument on the east side that differentiated the common boundary between the Davis' property and the Woods' property, the survey was started at the poplar tree on the west side and brought back across in an easterly direction, resulting in the placement of the eastern corner about where the culvert is now. The Woods claim that because a heated conflict ensued between Mr. Davis and the surveyor as to the common boundary line, Noah Woods instructed Mr. Wilson to just step back down into the open field and mark off a half acre. In 1973, the Woods built their home on the half-acre tract they had received. A water line was installed beneath the driveway and an electric power line was placed alongside the western edge of the road. A buried gas line running under the power poles is reflected on Mr. Olmstead's survey. For over 30 years, the driveway at issue has been maintained and used solely by the Woods. Mrs. Davis had never attempted to terminate the use of the road by the Woods, but she contended in her complaint that "use has been strictly at the permission of the Plaintiff and her late husband."[2]

The trial in this matter was held on September 19, 2006. In the original judgment, dated November 27, 2006, the trial court found that the Nance survey correctly located and described the location of the original boundary between the parties. However, the trial court equitably adjusted the boundary as follows:

> [T]he south boundary line of the Plaintiffs' property and the north boundary line of the Defendants' property should be adjusted to show that the east corner between the parties is the existing iron pin and concrete marker as depicted on the Nance survey, Exhibit 6; thence the line should cross the existing gravel road to the north side of the gravel driveway on the south end of the Plaintiffs' tract and the line should run thence on the north side of the existing gravel driveway as far as necessary to connect it with the remnants of the existing fence on the west side of the property and the line should run thence along the fence remnant to the large poplar tree. The line described throws the entire gravel driveway onto the Defendants' property. The Defendants have acquired title to the property located on the south side of the line just described by adverse possession for more than 30 years under color of title.

The trial court further found that

> [t]here exists and has existed a one-lane farm road or driveway located parallel with and just west of the Plaintiffs' east boundary line from the property now owned by the Defendants across the property

[2]Mr. Woods testified at trial that Mr. Davis had challenged the placement of a water line and required defendants to put the line down the center of the driveway.

> of the Plaintiffs to the termination of Angel's Lane, formerly known as Devil's Road. The Defendants are vested with an implied easement of necessity across the aforesaid driveway as a means of ingress and egress to and from the Defendants' property and Angel's Lane, which easement is appurtenant to the Defendants' property. The Defendants do not own the driveway; rather, the Plaintiffs own the driveway. The Defendants merely are vested with an easement to use the surface as a means of ingress and egress to and from the Defendants' property and Angel's Lane. Because the Plaintiffs own the land, they have a right to use the driveway and the Plaintiffs may use it in the ordinary way it is supposed to be used, including driving, walking or any similar activity over the entire length of the driveway. The Plaintiffs may grant or permit third parties to use the driveway and the Defendants cannot stop the Plaintiffs from allowing third parties from using the driveway. As long as the Plaintiffs and any third party do not block the driveway to prevent the Defendants from coming and going, the fact that a third party may be granted a right of ingress and egress across the driveway does not infringe upon the Defendants' right of ingress and egress across the driveway. Further, if the Defendants are the only persons using the driveway, then they should be completely responsible for its maintenance and upkeep; however, if any other person, including the Plaintiffs, use the driveway, then each person using the driveway should be equally responsible for the maintenance and upkeep of the driveway over that portion of the driveway that they use.

The trial court held that the 2004 deed by which Mr. Woods purported to convey the driveway to himself and his wife "convey[ed] nothing," stating as follows:

> Said Deed should be declared null and void and removed as a cloud upon the Plaintiffs' property and this Judgment should be recorded to constitute a muniment of title.

As to the claim of libel of title, the trial court noted the following:

> On the claim of libel of title, the Court has a problem with the Defendants' argument that Exhibit 1 was executed and recorded in good faith. On the other hand, the Court has difficulty accepting that the Plaintiffs have suffered a diminution in value of their land as a result of the execution and recording of Exhibit 1. It appears to the Court that what the Plaintiffs lost is the time and great expense they had to go to, to prosecute this case in order to defend themselves from the actions of the Defendants regarding the title to the driveway so

> that the real loss was not the diminished value of the land or lost opportunities or lost sales, but the litigation expenses incurred in order to prosecute this case. The Court is disinclined to allow recovery for diminished value of the land, but finds that a ruling on the issue of damages for libel of title should be reserved in order to allow the parties time to resolve it, and if they cannot resolve the issue, then the Court will consider a claim for litigation expenses.

The court subsequently awarded the plaintiffs fees and expenses.

On December 27, 2006, the defendants moved to alter or amend the judgment. The Woods asserted that while the trial court had found an easement of necessity appurtenant to the plaintiffs' property, there had been exclusive utilization of the plaintiffs' property by the defendants for a water line, water meter, power poles and lines, and a mailbox in excess of 7 years. The plaintiffs responded by asserting that they do not maintain that the Woods should not have "the legal ability to maintain the existing electrical power distribution and water utility lines." They did contend the proof at trial showed that the water meter and the mailbox have been located in their present locations for less than 7 years. In an order denying in part and granting in part the motion, the trial court noted, *inter alia*, as follows:

> The portion of the Motion that is granted amends paragraph 2 on page 7 of the Order, as the Court finds that the Defendants are vested with an implied easement of necessity across the Plaintiffs' property from the northern line of Defendants' property, continuing along the eastern boundary of Plaintiffs' property to Angel's Lane as a means of ingress and egress to and from Defendants' property, which easement is appurtenant to the property of Defendants, but said easement shall not be wider than the existing gravel driveway. However, the Defendants/Counterplaintiffs shall not be allowed to move the existing power pole further to the west or more onto the property of Plaintiffs. All other portions of the Motion to Alter or Amend are denied . . . .

The defendants filed a timely appeal.

II.

The following issues are presented by the Woods:

> 1. Whether the court erred in awarding damages for libel of title and awarding attorney's fees and costs against the defendants.
>
> 2. Whether the court erred in finding the description of surveyor

Nance was the common boundary line between the parties.

3. Whether the court erred in failing to find that the defendants had obtained a prescriptive easement or an implied easement of necessity for utilities.

4. Whether the court erred by limiting the width of the driveway and by refusing to permit the movement of the power pole.

The Davis heirs raise the issue of whether this court should award them reasonable attorney's fees and costs incurred in defending this appeal as either additional damages under the libel of title claim or as damages pursuant to Tenn. Code Ann. § 27-1-122 (2000).[3]

III.

This case was tried by the court without a jury. Therefore, our review is *de novo* upon the record of the proceedings below with a presumption of correctness as to the findings of fact of the trial court. *See* Tenn. R. App. P. 13(d). The judgment of the trial court should be affirmed, absent errors of law, unless the preponderance of the evidence is against those findings. ***Bogan v. Bogan***, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to *de novo* review with no presumption of correctness. *See* ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993).

The review of a denial of a motion to alter or amend a judgment under Tenn. R. Civ. P. 59.04 is under the abuse of discretion standard. *See* ***Chambliss v. Stohler***, 124 S.W.3d 116, 120 (Tenn. Ct. App. 2003); ***Bradley v. McLeod***, 984 S.W.2d 929, 933 (Tenn. Ct. App. 1998). The trial court will be found to have abused its discretion if its ruling is against logic and causes harm to the complaining party or if it applies an incorrect legal standard. *See* ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn. 2001). However, the ruling of the trial court should be affirmed "so long as reasonable minds can disagree as to propriety of the decision made." ***State v. Scott***, 33 S.W.3d 746, 752 (Tenn. 2000).

[3]Tenn. Code Ann. § 27-1-122 provides as follows:

> When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

IV.

A.

The defendants contend with respect to the first issue that the trial court erred in finding libel of title[4] and in awarding attorney's fees and costs as damages against them. They assert three reasons why this court should determine that the trial court erred with regard to this issue. First, the defendants insist that Mrs. Davis' complaint failed to expressly allege malice or facts that would give rise to a reasonable inference of malice. Second, the Woods assert that even if their claim to the driveway was not correct, their actions were taken in good faith. In particular, the defendants contend that the advice of counsel defense entitled them to complete immunity and that the trial court, as a matter of law, erred when it ignored the unrefuted testimony that counsel had been involved in all the actions by the defendants. Finally, the Woods contend that their statements about the driveway were privileged, in that the recording of the warranty deed to start the 7-year period running for color of title was a communication that was preliminary to proposed litigation.

Libel of title has been recognized as a cause of action in Tennessee for at least 97 years. ***Smith v. Gernt***, 2 Tenn. Civ. App. 65, 79-80 (1911). "[O]ne may become liable by asserting title in bad faith and without probable cause to the injury of another." ***Id.*** at 80. Libel of title has been found to occur "when a person . . ., without privilege to do so, willfully records or publishes matter which is untrue and disparaging to another's property rights in land as would lead a reasonable person to foresee that the conduct of a third party purchaser *might* be determined by the publication, or maliciously records a document which clouds another's title to real estate." 53 C.J.S. *Libel and Slander* § 310 (2005) (footnotes omitted) (emphasis added). To establish a successful claim for libel of title in this state, a plaintiff must prove: "(1) that it has an interest in the property; (2) that the defendant published false statements about the title to the property; (3) that the defendant was acting maliciously, and (4) that the false statements proximately caused the plaintiff a pecuniary loss." ***Brooks v. Lambert***, 15 S.W.3d 482, 484 (Tenn. Ct. App. 1999) (quoting ***Harmon v. Shell***, No. 01-A-01-9211-CH-00451, 1994 WL 148663, at *4 (Tenn. Ct. App. M.S., filed April 27, 1994)). *See also*, 53 C.J.S. *Libel and Slander* § 313 (2005). Statements made with a reckless disregard of the rights of the property owner or with reckless disregard as to whether the statements are false may be found to be malicious within the scope of an action for libel of title. ***Brooks***, 15 S.W.3d at 484. Malice must be alleged expressly or a plaintiff must allege facts that would give rise to a reasonable inference that the defendant acted maliciously. *See* ***Waterhouse v. McPheeters***, 145 S.W.2d 766, 767 (Tenn. 1940); ***Brooks***, 15 S.W.3d at 484. A good faith claim of title, even though erroneous, does not give rise to a cause of action for libel of title. *See* ***Ezell v. Graves***, 807 S.W.2d 700, 704 (Tenn. Ct. App. 1990); ***Brooks***, 15 S.W.3d at 484. The requirement that there must be proof of pecuniary loss means there must be proof of actual or special damages. *See* ***Ezell***, 807 S.W.2d at

[4]We focus on "libel" of title because the instant case involves a writing. With respect to the basis upon which we decide this case, what we say about libel of title applies with equal force to slander of title. The action is sometimes referred to as one for disparagement of title. *See* ***Albertson v. Raboff***, 295 P.2d 405, 408 (Cal. 1956). We have previously held that this cause of action, regardless of the label placed upon it, is a species of a claim for "injurious falsehood." *See* ***Wagner v. Fleming***, 139 S.W.3d 295, 302 (Tenn. Ct. App. 2004).

701. As discussed in ***Ezell***, the element of pecuniary loss can be met by proving the litigation expenses incurred to remove the doubt cast upon the property by the publication of the false statements. *See* ***Ezell***, 807 S.W.2d at 703; ***Brooks***, 15 S.W.3d at 485.

Tennessee courts have held that advice of counsel can establish the existence of probable cause when the advice is honestly sought and all the material facts have been presented to counsel. When these criteria are met, such advice of counsel entitles the party sued to complete immunity as a matter of law. ***Cooper v. Flemming***, 84 S.W. 801, 802 (1904). This state further recognizes that "statements made in the course of judicial proceedings which are relevant and pertinent to the issues are absolutely privileged and therefore cannot be used as a basis for a libel action for damages." ***Jones v. Trice***, 360 S.W.2d 48, 50 (Tenn. 1962); *see also* ***Myers v. Pickering Firm, Inc.***, 959 S.W.2d 152, 159 (Tenn. Ct. App. 1997). This is true even if the statements are "known to be false or even malicious." ***Jones***, 360 S.W.2d at 50 (citing ***Hayslip v. Wellford***, 263 S.W.2d 136 (Tenn. 1953)). The policy underlying this rule is

> that access to the judicial process, freedom to institute an action, or defend, or participate therein without fear of the burden of being sued for defamation is so vital and necessary to the integrity of our judicial system that it must be made paramount to the right of an individual to a legal remedy where he [or she] has been wronged thereby.

Jones, 360 S.W.2d at 51. ***Myers*** also expressly stands for the proposition that "communications preliminary to proposed or pending litigation" are absolutely privileged. ***Myers***, 959 S.W. at 161 (quoting Restatement of Torts § 587).

The Davis heirs first note that while the defendants filed an answer and counterclaim asserting 14 affirmative defenses, they did not challenge the sufficiency of the complaint on the libel of title action. The plaintiffs further point out that the Woods did not file a motion to dismiss for failure to state a claim upon which relief can be granted under Tenn. R. Civ. P. 12.02(6), which motion would have tested the sufficiency of the factual allegations of the complaint. *See, e.g.*, ***Holloway v. Putnam County***, 534 S.W.2d 292, 296 (Tenn. 1976); ***Merriman v. Smith***, 599 S.W.2d 548, 560 (Tenn. Ct. App. 1979). The plaintiffs contend that Rule 12.08 requires that all defenses not presented in a motion, an answer, or reply are waived, except "(1) that the defense of failure to state a claim upon which relief can be granted . . . may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits. . . ." Tenn. R. Civ. P. 12.08. The Woods, however never asserted a defense of failure to state a claim upon which relief can be granted by either a motion, or in their answer, or at trial. Therefore, the plaintiffs claim, under Tenn. R. Civ. P. 12.08, that the defendants' claimed defense was waived and may not be asserted for the first time on appeal. *See* ***Alexander v. Armentrout***, 24 S.W.3d 267, 272 (Tenn. 2000); ***Civil Service Merit Bd. v. Burson***, 816 S.W.2d 725, 734-35 (Tenn. 1991).

Absent a finding of waiver by the court, the plaintiffs argue that the complaint alleges sufficient facts to give rise to a reasonable inference of malice. In ***Ezell***, an appeal in which the

defendants argued that the plaintiff had failed to allege malice in the complaint and that the complaint therefore failed to state a claim upon which relief could be granted, this court explained the holding of the Supreme Court's ***Waterhouse*** opinion, 145 S.W.2d at 767, in light of the notice pleading permitted under the Tennessee Rules of Civil Procedure as follows:

> [W]e do not read *Waterhouse* as constrictively as the defendants. While the court stated that "as a general rule the complaint must allege malice and want of probable cause," they also went on to find that "looking to the allegations of this bill, we do not find malice stated in express terms or any such showing of facts as would give rise to a reasonable inference that the levies were made by the officer in this case maliciously."
>
> We believe the complaint in this case was sufficient to put the defendants on notice of what was being claimed against them. The plaintiffs' pleading states that the defendants alleged themselves to be the owners of land belonging to the plaintiffs, that the defendants never spoke to the plaintiffs or told them they were going to advertise the land for sale, that the defendants' deed was champertous and declared void, and as a result of the defendants' libel of title the plaintiffs have been damaged. The Tennessee Rules of Civil Procedure declare that all pleadings must be construed so as to do substantial justice, Tenn. R. Civ. P. 8.06, and that in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity and that malice, intent, knowledge, and other conditions of the mind may be averred generally, Tenn. R. Civ. P. 9.02. The complaint here avers sufficient facts to give rise to a reasonable inference that the defendants acted maliciously.

Ezell, 807 S.W.2d at 704 (citation and emphasis omitted). Based on the reasoning expressed in ***Ezell***, the plaintiffs assert that the complaint in this case sufficiently alleged facts giving rise to a reasonable inference that the Woods acted maliciously and to put the defendants on notice that they were being sued for libel of title.

Placing the deed in the context of the facts that lead to its making, execution, and recording, we find support in the record for the trial court's conclusion that the Woods knew they did not own the driveway and, when they could not acquire it from the true owner, Mrs. Davis, they attempted to take it by making, executing and recording the deed, with reckless disregard of the legal rights of Mrs. Davis. Mr. Woods' testimony is insufficient to show that the trial court's finding of malice is against the weight of the evidence. We believe the complaint in this case averred sufficient facts to put the Woods on notice of what was being claimed against them and to give rise to a reasonable inference that the defendants acted maliciously.

As to the defendants' good faith defense, the plaintiffs note that Mr. Woods admitted the following: he did not have a deed to the disputed driveway, other than the deed he crafted himself and recorded; he never requested an attorney to research the title to the driveway to determine if he owned it; and no surveyor told him that he owned the driveway. Based on Mr. Woods' admissions, the plaintiffs assert that the facts belie Mr. Woods' claim that he genuinely believed he owned the driveway.

The question of whether the Woods acted in good faith is a question of fact to be resolved by the fact finder from the evidence adduced at trial. *See* 53 C.J.S. *Libel and Slander* § 332 (2005). The burden of proving good faith in publishing the alleged libel is upon the defendants. *See* ***id.*** at § 334.

The trial court, which had the opportunity to observe the witnesses and was in the best position to judge their credibility, found that the Woods did not act in good faith ("On the claim of libel of title, the Court has a problem with the Defendants' argument that Exhibit 1 was executed and recorded in good faith.").[5] The Woods specifically claim that they had shown good faith because they relied upon advice of counsel. There are, however, no facts in the record regarding the advice counsel provided, other than Mr. Woods' general statement that he acted upon the advice he received from an attorney. The record is silent as to what facts were provided to the attorney by the defendants or what specific advice the attorney provided to them. Since the attorney who advised the Woods did not testify, we are only left to speculate whether the Woods told the attorney all the facts. Mr. Woods' testimony, standing alone, is insufficient to show that the trial court's finding was erroneous. *See* ***Gillmor v. Cummings***, 904 P.2d 703, 708 (Utah Ct. App. 1995). The evidence in the record does not preponderate against the trial court's decision that the Woods failed to act in good faith.

The general rule pertaining to the privileged nature of a statement made in litigation is found at 50 Am. Jur. 2d *Libel and Slander* § 558 (1995):

> A publication is privileged if (1) it is made in judicial or quasijudicial proceedings, (2) by litigants or other participants authorized by law, (3) to achieve the objects of the litigation, and (4) they have some connection or logical relation to the action.

---

[5] At the conclusion of the bench trial, the court orally stated the following:

> You know, this really – that term, "good faith," I think is a legitimate issue here. And I understand Mr. Woods' desire to have that road to the exclusion of all others, including the Plaintiffs, including the rightful owners. I understand his desire to have it and if he could, to take it.
>
> He had and was never deprived of the thing that the road provided him, and that is ingress and egress. He was never deprived of that. His desire was to acquire more than that. And, so, I've got a problem with Mr. Woods when he argues that all of this was done in good faith.

Id. The Woods contend the instant case is controlled by our decision in ***Desgranges v. Meyer***, No. E2003-02006-COA-R3-CV, 2004 WL 1056603 (Tenn. Ct. App. E.S., filed May 11, 2004). In ***Desgranges***, the court was asked to find a libel of title after the filing of a false mechanic's lien which was followed by the filing of suit to enforce the lien. The facts in this case are fundamentally different. In ***Desgranges***, we held that the filing of the lien was necessarily preliminary to the filing of the lawsuit to enforce the lien. ***Id.*** at *6. That is not the case here. In the instant case, the filing of the subject deed with the Register of Deeds was not a part of, or in anticipation of, litigation. Quite to the contrary, the Woods assert that it was filed with the hope that litigation could be avoided. ***Desgranges*** is not authority for the Woods' position in this case.

In our view, the facts in this case do not bring the Woods within the above quoted rule from Am. Jur. The deed was clearly made with the hope that no judicial proceeding would occur. Thus, we find that the filing of the deed was not a part of a judicial proceeding so as to clothe the statements made in the deed with absolute immunity from suit for libel of title. Furthermore, the Woods never asserted privilege as a defense in either the answer, a motion, or at trial. Despite the numerous affirmative defenses raised in their answer, the defendants never asserted privilege before this appeal. Any defense based upon privilege was therefore waived and may not be asserted now for the first time on appeal. *See* ***Alexander***, 24 S.W.3d at 272; ***Civil Serv. Merit Bd.***, 816 S.W.2d at 734-35.

Litigants who are successful in a libel of title action may recover reasonable expenses incurred in that suit. ***Ezell***, 807 S.W.2d at 703. These expenses may include, *inter alia*, attorney's fees, costs of depositions, and court reporter fees. ***Brooks v. Brake***, No. 01A01-9508-CH-00365, 1996 WL 252322, at *4 (Tenn. Ct. App. W.S., filed May 15, 1996).[6] Although attorney's fees are not normally awarded in civil litigation absent a "contract, statute or recognized ground of equity," ***State ex rel. Orr v. Thomas***, 585 S.W.2d 606, 607 (Tenn. 1979), an exception to the general rule exists in cases involving libel of title. ***Ezell***, 807 S.W.2d at 703.

In ***Ezell***, this court noted that a property owner in a slander of title action does not have remedies short of litigation, unlike the victim in a defamation of character case, who may counter the false publications by public denial or a retraction by the offending author. ***Ezell*** contrasted the differences between a defamation of character case and a slander of title case as follows:

> When a cloud has been cast upon the title to property, the owner does not have the same options to correct the wrong. The sole way of dispelling another's wrongful assertion of title is by hiring an attorney and litigating. If the defamed party were to simply speak out in denial, as he might with a character attack, he could risk completely

[6] In ***Brooks***, the trial court awarded plaintiffs attorney fees, one half of the survey cost, and witnesses' expenses incurred by plaintiffs. ***Id.*** at *1.

> losing title by adverse possession. The plaintiffs here were forced into court by the defendants' actions. They were required to hire counsel, take depositions, arrange for court reporters, and run up numerous other expenses. These costs, which represented the only possible course of action to clear their title, flow directly and proximately from the defendants' conduct. But for the defendants filing of a deed and placing an advertisement for the sale of this land, the plaintiffs would not have incurred these expenses. As such, they represent an actual pecuniary loss that, if substantiated, should be recoverable as special damages.

Ezell, 807 S.W.2d at 703.

As to the issue of damages in this case, which the plaintiffs must prove in order to recover on the libel of title claim, the trial court noted in its judgment as follows:

> [T]he Court has difficulty accepting that the Plaintiffs have suffered a diminution in value of their land as a result of the execution and recording of [the deed]. It appears to the Court that what the Plaintiffs lost is the time and great expense they had to go to, to prosecute this case in order to defend themselves from the actions of the Defendants regarding the title to the driveway so that the real loss was not the diminished value of the land or lost opportunities or lost sales, but the litigation expenses incurred in order to prosecute this case.

The majority of jurisdictions that have considered the issue of what constitutes proof of special damages in a libel of title action have held that an aggrieved party has the right to recover as special damages the litigation expenses incurred in removing the effects of the libel, even in the absence of an impairment of marketability. *See generally* James O. Pearson, Jr., Annotation, *What Constitutes Special Damages in Action for Slander of Title*, 4 A.L.R. 4th 532, 562 (1981 & Supp. 2007).

In the instant case, the trial court awarded the plaintiffs $4,000 in attorney's fees, $1,000 in surveyor's fees, and court reporter charges of $602.75, for a total award of $5,602.75 as damages for libel of title. The plaintiff had sought fees and expenses of $8,957.40. While the trial court did not expressly state that it was doing so, it may well have reduced the plaintiffs' request because their suit had sought relief in addition to its request for a finding of libel of title. The plaintiffs do not challenge the correctness of the lesser award and, in any event, the evidence does not preponderate against that award.

B.

The Woods next claim that the trial court erred by not adopting the survey prepared by their surveyor, William B. Steelman, and by finding that Mr. Nance's description reflected the correct common boundary line of the parties. They also assert that Mr. Nance improperly determined the northern boundary of the plaintiffs' property.

This court has previously discussed the framework a court should use when dealing with a boundary dispute:

> 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. *Pritchard v. Rebori*, 135 Tenn. 328, 186 S.W.121 (1916); *Minor v. Belk*, 50 Tenn. App. 213, 360 S.W.2d 477 (1962); *Doss v. Tenn. Prod. & Chem. Corp.*, 47 Tenn. App. 577, 340 S.W.2d 923 (1960). This rule of construction is to aid in determining the intention of the parties to a deed which is to be determined, if possible, from the instrument in connection with the surrounding circumstances. *Dearing v. Brush Creek Coal Co.*, 182 Tenn. 302, 186 S.W.2d 329 (1945); *Cates v. Reynolds*, 143 Tenn. 667, 228 S.W. 695 (1920).

Thornburg v. Chase, 606 S.W.2d 672, 675 (Tenn. Ct. App. 1980); *see also* ***Mix v. Miller***, 27 S.W.3d 508, 513 (Tenn. Ct. App. 1999). The issue of where the boundary called for in the deeds is located on the surface of the earth is a question of fact. *See* 12 Am. Jur. 2d *Boundaries* § 121 (1997). The general standard of review for bench trials applies to boundary disputes. *See* ***Thornburg***, 606 S.W.2d at 675. We review a trial court's determination of a boundary line *de novo* upon the record before us, according that judgment a presumption of correctness. Tenn. R. App. P. 13(d). Accordingly, we will not disturb the trial court's judgment unless the evidence preponderates against it. ***Id.***

When resolving a boundary line dispute, as in the case before us, it is incumbent upon the trier of fact to evaluate all of the evidence and assess the credibility of the witnesses. ***Mix***, 27 S.W.3d at 514. As boundary line disputes are fact-intensive, the trial court is in the best position to assess the credibility of the witnesses. ***Id.*** Consequently, a trial court's credibility determinations are binding on this court unless the evidence preponderates against them. ***Id.*** This deference extends to a trial court's decision between competing surveys. *See* ***id.***

The following relevant language is found in Mrs. Davis' deed:

> TRACT TWO: Beginning on the Brown and Lamance corner and running south 32 poles to a stone corner; then west 25 poles to a

> [poplar] tree in the Leopper line; then north with the Leopper line 31 poles to the Brown line; then east 25 poles to the beginning, corner, containing about four acres, more or less.

The call – "west 25 poles[7] to a [poplar] tree in the Leopper line" – describes the common boundary at issue.

Two deeds for the defendants' property describe the common boundary line. The first deed was for a half-acre tract and provides as follows:

> Beginning on a stake set north 85 degrees west 15 feet from James Davis' corner in Jesse Summers line and running thence south 4 degrees 15 minutes west 132 feet to a stake located 15 feet from the Summers line; thence, north 4 degrees 85 minutes west 165 feet to a stake; thence north 4 degrees 15 minutes east 132 feet to a stake in the Davis line; thence with the Davis line to the point of beginning, containing one-half acre, more or less.

The call "to a stake in the Davis line; thence with the Davis line to the point of beginning"reflects the common boundary between the parties. The second Woods' deed describes an eight-acre tract as follows:

> Beginning at the corner of J.P. Barger and Vance LaMance and running about west to the George Leopper line; thence, south with the Leopper line to the Carl Swint line; thence about east with the Swint line to the Toy Wilson (now Gann) and Vance LaMance corner; thence north with the LaMance line to the beginning corner, containing about 8 acres, more or less.

The call "[b]eginning at the corner of J.P. Barger and Vance LaMance and running about west to the George Leopper line" describes the common boundary.

Both of the testifying surveyors agreed that the line terminated on the west at a large poplar in the Leopper line and that the location of the common boundary line was controlled by Mrs. Davis' deeds. Where the straight line terminated on the east was in dispute.

The trial court agreed with Mr. Nance's testimony that the location of the disputed east corner of the common boundary was controlled by the beginning point of Tract 2 of the Davis property, which, in turn, was controlled by the location of Tract 1 of the Davis property:

> TRACT ONE: Beginning on a stone 1 pole south of Ben Jones line

---

[7] A "pole" is a measure of length, equal to 5.5 yards or 16.5 feet. *Black's Law Dictionary* 1041 (5th ed. 1979).

> and running west to the George Leopper line; thence south 62 feet with George Leopper line; then east 129 feet to Liza Justice line; then north 62 feet to the beginning corner, containing one-half acres, more or less, and laying on the south side of Highway Number 62.

Mr. Nance testified that, in his opinion, Tract 1 of the Davis property was a rectangle about 62 feet wide and about 416 feet long extending from the Leopper line on the west to the Justice line on the east. Mr. Nance opined that the deed description for Tract 1 contains a discrepancy because the southern line states a distance of 129 feet, but also states that it runs to the Justice line. Mr. Nance, therefore, carried the southern line completely across to the Justice line. In contrast, Mr. Steelman depicted Tract 1 as a small rectangle about 62 feet wide and 129 feet long on the western side of the Davis property. Mr. Steelman did not carry Tract 1 entirely across the northern portion of the Davis property, but rather surveyed the southern line of Tract 1 using 129 feet, which was the distance called for in the deed. Because of the way Mr. Steelman surveyed Tract 1, his beginning point for Tract 2 was thrust to the north 62 feet to a point in the southern edge of the county road, which he identified as the Vance Lamance and Liza Justice corner. Mr. Steelman then proceeded south about 32 poles to an unmonumented point near a 12-inch culvert, which point he claimed was the disputed east corner. While Mr. Steelman disagreed that the beginning point for Tract 2 begins 62 feet to the south of where he started, as asserted by Mr. Nance, he acknowledged that there were other reasonable interpretations of Tract 1 of the Davis property.

The deed description for Tract 1 of the Davis property states that it is bordered on the west by Leopper and on the east by Justice. Both of the surveyors agreed upon the location of the Leopper line and the Justice line. The plats for both surveyors, Exhibits 6 and 9, agreed that the Leopper line is the west line of the Davis and Woods properties and that the Justice line is the east line of both parties and that it is located immediately east of and parallel to the disputed driveway. The second to last call of Tract 1 of the Davis property is an east course running from the Leopper line to the Justice line for a stated distance of 129 feet. Mr. Nance ignored the distance because the deed calls for the line to run from the Leopper line to the Justice line, and both of the surveyors agreed on the location of the Leopper and Justice lines. In contrast, Mr. Steelman ignored the language in the deed description calling for it to run to the Justice line and instead gave precedence to the stated distance of 129 feet.

The trial court heard the testimony, examined the exhibits, and weighed the evidence using the correct framework when making its findings of fact. The Nance survey was found by the trial court to correctly locate and describe both tracts of the Davis property. Therefore, the Nance survey was found to correctly reflect the boundary between the plaintiffs and defendants as called for by the deeds of both parties. Based on the law regarding the resolution of conflicts between calls of description in deeds which states that resort is first had to natural objects or landmarks, then to artificial objects or landmarks, then to adjacent boundaries, and finally to courses and distances, the trial judge correctly concluded that Tract 1 of the Davis property ran from the Leopper line on the west to the Justice line on the east, and that the distance called for in the deed of 129 feet had to yield to the adjacent boundary of Justice as called for in the deed.

The legal description for Tract 1 of the Davis property also calls for the property described to contain about half an acre. Mr. Steelman's survey depicts Tract 1 as a rectangle with dimensions of about 62 feet by 129 feet, or approximately 8,000 square feet. Mr. Nance's survey depicts Tract 1 as a rectangle with dimensions of about 62 feet by 416 feet, or about 25,792 square feet. An acre is 43,560 square feet. *See Webster's Seventh New Collegiate Dictionary* 525 (Measures and Weights Table) (1965). A half acre therefore is 21,780 square feet. The dimensions of Tract 1 as depicted on the Nance survey are much closer to the quantity of land called for by the deed than the dimensions of Tract 1 as depicted on the Steelman survey. The call for the quantity of land in a deed may be resorted to for the purpose of locating and identifying the land in certain circumstances. *See* ***Obin Valley Land & Inv. Co. v. Southern Gen. Life Co.***, 125 S.W.2d 482, 483 (Tenn. 1939). "The boundaries of a tract of land are not usually delineated by the quantity or acreage," but "where boundaries are in doubt, the quantity may become an important factor." ***Slack v. Antwine***, No. W2000-00961-COA-R3-CV, 2001 WL 30527, at *5 (Tenn. Ct. App. W.S., filed January 11, 2001) (citing 12 Am. Jur. 2d *Boundaries* § 10 (1997)). Thus, the fact that the Nance survey more closely produces the quantity of land called for in the deed supports the conclusion that it correctly located Tract 1.

We find that the evidence does not preponderate against the trial court's finding that the Nance survey correctly located the true common boundary between the parties as described in their deeds.[8] We affirm on this issue.

The Woods additionally argue that the Nance survey improperly allocated to the Davis heirs the strip of property located one pole south of the Ben Jones line. The heirs concede that Tract 1 of their property is located one pole south of the Ben Jones line. It is their position that whether Mr. Nance should have allocated the one pole strip of property to them is not relevant because there was no issue in this case about the location of the northern boundary of the Davis property. We agree with the plaintiffs that this matter is not before us. Hence, we decline to address it.

C.

The Woods also argue that the court erred by not finding that they had obtained a prescriptive easement or an implied easement of necessity for utilities as a result of their use of the Davis property for such purposes for over 30 years. The defendants claim the proof is clear that they utilized the property, with the knowledge of Mrs. Davis, for water and gas lines and for power poles with transmission lines furnishing electric power. The Woods note that their answer to the original complaint mentioned utility services in the roadway and alleged that improvements and utility services had been on the roadway for decades. The defendants further indicate that they concluded

[8]The plaintiffs do not contest the action by the trial court adjusting the boundary and finding that the defendants had acquired title to the property located on the south side of the revised line by adverse possession for more than 30 years under color of title.

their counterclaim requesting "such other, further and general relief as to which they may be entitled."

The trial court determined that the driveway utilized by the Woods, as well as Mr. Woods' father, was not fenced. For that reason, the trial court ruled that there could be no adverse possession. The court found, however, that because Mr. Langley had failed to expressly retain an express easement for ingress and egress for the benefit of what is now the defendants' property when he conveyed the property now belonging to the plaintiffs, the Woods have an implied easement of necessity for ingress and egress. *See* ***LaRue v. Greene County Bank***, 166 S.W.2d 1044, 1050 (Tenn. 1942). In its later order, the trial court modified its initial judgment, holding that the implied easement of necessity allowed the Woods to utilize only the surface of the driveway for ingress and egress. The trial court did not address the utilities issue.

The facts and law fully support the trial court's opinion that the Woods were vested only with an implied easement of necessity along the driveway. *See* ***Cellco P'ship v. Shelby County***, 172 S.W.3d 574, 592 (Tenn. Ct. App. 2005); ***Morris v. Simmons***, 909 S.W.2d 441, 444-45 (Tenn. Ct. App. 1993). Since the Woods were vested with a legal right to use the driveway, their use was not adverse to the legal rights vested in the servient estate and therefore would never ripen into an adverse or prescriptive easement or fee. *See* 28A C.J.S. *Easements* § 50 (1996); 25 Am. Jur. 2d *Easements and Licenses* § 54 (1996).

The plaintiffs assert that the trial court properly made no finding that the defendants had either an implied easement of necessity or a prescriptive easement *to maintain utility services* because the Woods never raised the issue before or during the trial. The Davis heirs contend that the first time the defendants attempted to raise an issue about utility service was in the post-judgment motion to alter or amend the judgment. The plaintiffs, therefore, contend that it was too late after judgment to attempt to raise an issue that should have been asserted in the counterclaim. *See* ***Bradley***, 984 S.W.2d at 933. Assuming, *arguendo*, that the defendants properly framed a counterclaim about utility services, the plaintiffs assert that the Woods failed to carry their burden of proving that they were vested with either a prescriptive easement or an implied easement of necessity to maintain utilities.

A Rule 59.04 motion to alter or amend should not be used to alter or amend a judgment if it seeks to raise new, previously untried legal theories and arguments or attempts to introduce new evidence that could have been adduced and presented earlier. On this basis, the trial court declined to exercise its discretion to grant any relief on the defendants' motion based on a theory of either an implied easement of necessity or a prescriptive easement.

We agree with the plaintiffs and the trial court that the issue of the legality of the utilities associated with the easement was not litigated below. Therefore, we hold that the trial court did not abuse its discretion in failing to address this issue. The resolution of this issue must await another day.

D.

In the defendants' final argument, they argue that the trial court erred by limiting the width of the driveway and prohibiting the movement of the power pole. The Woods contend that the surveys of Mr. Olmstead, Mr. Nance, and Mr. Steelman, revealing a dotted or curved line moving from the southern portion of the county road to the eastern portion of the driveway, support their contention that the entrance to the northernmost end of the driveway is gained by crossing a third party's property immediately to the east of the Davis property. According to the Woods, the topography of the northern side of Angel's Lane, as well as the placement of the power pole at the northern end of the driveway, require the defendants and any of their guests utilizing the driveway to start making the turn into the roadway well before they reach the end of Angel's Lane. The defendants argue that the power pole at the northern end of the driveway is right in the middle of the portion of the driveway that would be utilized in making the turn.

The defendants assert, as support for their argument, the provisions of Tenn. Code Ann. § 54-14-101(a)(2) (2004), which provide as follows:

> (a)(1) When the lands of any person are surrounded or enclosed by the lands of any other person or persons who refuse to allow to such person a private road to pass to or from such person's lands, it is the duty of the county court, on petition of any person whose land is so surrounded, to appoint a jury of view, who shall, on oath, view the premises, and lay off and mark a road through the land of such person or persons refusing, as aforementioned, in such manner as to do the least possible injury to such persons, and report the same to the next session of the court, which court shall have power to grant an order to the petitioner to open such road, not exceeding twenty-five feet (25') wide, and keep the same in repair. . . .
>
> (2) If the person petitioning for a private road needs additional land for the purpose of extending utility lines, including, but not limited to, electric, natural gas, water, sewage, telephone, or cable television, to the enclosed land, such person shall so request in the petition. Upon receipt of a petition requesting additional land for the extension of utility lines, the court may grant such petitioner's request and direct the jury of view to lay off and mark a road that is fifteen feet (15') wider than is permitted by the provisions of subdivision (a)(1).
>
> (b) Any person granted a court order pursuant to this section prior to July 1, 1981, to open a private road shall be permitted to re-petition such court to increase the width of such road to a maximum of twenty-five feet (25'). The court shall appoint a jury of view to

adjudge additional damages. . . .

The plaintiffs assert that under Tennessee law, the width of the easement of necessity is determined by its actual size at the time created. *See* ***Morris***, 909 S.W.2d at 446. With regard to the northernmost power pole, the plaintiffs claim that the defendants did not assert at trial that the pole should be moved, but first brought the matter to the trial court's attention at the hearing on the motion to alter or amend the judgment. The motion itself did not raise an issue about moving the power pole, and the defendants did not assert an issue about moving the power pole in their answer and counterclaim. No such claim was asserted at trial. According to the plaintiffs, it is too late for the defendants to raise this issue at the hearing on their motion to alter or amend the judgment under Tenn. R. Civ. P. 59.04. *See* ***Bradley***, 984 S.W.2d at 933.

In ***Cellco P'ship***, this court stated that

> "[t]he range of permissible uses of any particular easement is in the first instance defined by the circumstances surrounding the creation of that easement; its use is limited to the purposes for which it was created." 28A C.J.S. *Easements* § 159 (1996). Our case law adopts this general proposition providing that:
>
> "The use of an easement must be confined strictly to the purposes for which it was granted or reserved. A principle which underlies the use of all easements is that the owner of an easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden." 17 Am. Jur. 996, sec. 98 . . . .
>
> "In other words, an easement appurtenant to a dominant tenement can be used only for the purposes of that tenement; it is not a personal right, and cannot be used, even by the dominant owner, for any purpose unconnected with the enjoyment of his estate. The purpose of this rule is to prevent an increase of the burden upon the servient estate, and it applies whether the easement is created by grant, reservation, prescription, or implication." 9 R.C.L., 786, sec. 43; Jones on Easements, secs. 99 and 100.
>
> "A principle which underlies the use of all easements is that the owner thereof cannot materially increase the burden of it upon the servient estate, nor impose a new and additional burden thereon. . . . It may be said in general that if an easement is put to any use inconsistent with the purpose for which it was granted, the grantee becomes a trespasser to the extent of the unauthorized use." 9 R.C.L., 790, sec. 47; Jones on Easements, secs. 99 and 100.

> *Adams v. Winnett*, 25 Tenn. App. 276, 156 S.W.2d 353, 357 (1941); *see also McCammon v. Meredith*, 830 S.W.2d 577, 580 (Tenn. Ct. App. 1991).

Cellco P'ship, 172 S.W.3d at 595-96. "'Where [an] easement is not specifically defined, it need be only such as is reasonably necessary and convenient for [the] purpose for which it was created.'" ***Burchfiel v. Gatlinburg Airport Auth., Inc.***, No. E2005-02023-COA-R3-CV, 2006 WL 3421282, at * 3 (Tenn. Ct. App. E.S., filed November 28, 2006) (quoting ***Adams v. Winnett***, 156 S.W.2d 353, 358 (Tenn. Ct. App. 1941)). The necessity required for an easement by necessity must exist at the time of the severance from the conditions existing at the time of the conveyance. 28A C.J.S. *Easements* § 96.

The easement of necessity in this case was created in the 1940s. At that time, the easement was a two-rut dirt farm lane. While Mr. Woods placed gravel on the road, the location and width of the driveway have remained the same. Thus, the trial court made the proper finding that the easement of necessity could not be wider. The trial court acted within its discretion in declining to grant the relief requested by the defendants. As to the defendants' citation to Tenn. Code Ann. § 54-14-101, the Woods did not properly assert a claim under the statute. The Woods may not assert the claim for the first time on appeal.

E.

The plaintiffs assert that this court should award them reasonable attorneys fees and costs incurred in defending this appeal, as either additional damages under the libel of title claim or as damages pursuant to Tenn. Code Ann. § 27-1-122. We hold that such an additional award is appropriate in this case but we do so only under the libel of title theory. We specifically do not find this appeal to be frivilous under Tenn. Code Ann. § 27-1-122. This case is remanded to the trial court for a hearing at which the court should determine what portion of the plaintiffs' fees and costs on appeal are applicable to the libel of title issue.

V.

The judgment of the trial court is hereby affirmed. Costs on appeal are taxed to the appellants, Lawrence Woods and Charlotte Woods. This case is remanded to the trial court for further proceedings as directed in this Opinion.

_____

CHARLES D. SUSANO, JR., JUDGE