

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Submitted on Briefs September 11, 2008

CHRIS D. THORNTON, ET AL. v. LESLIE HIGDON, JR., ET AL.

**Appeal from the Chancery Court for Sequatchie County
No. 2072 Jeffrey F. Stewart, Chancellor**

No. M2007-01944-COA-R3-CV - Filed October 23, 2008

The plaintiffs filed this action to quiet title to a twelve-foot strip of property claimed by adjoining property owners, the defendants. The defendants disputed the plaintiffs' claim and pointed to a seventy-foot drainage tile they had constructed and maintained as evidence of their ownership of the disputed strip of land. The trial court found that the boundary line should be set in accordance with the plaintiffs' survey; however, the trial court also found that the plaintiffs were equitably estopped to challenge the defendants' right to maintain the drainage tile. Both parties appeal. We affirm the trial court in all respects.

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

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which RICHARD H. DINKINS, J., and ROBERT W. WEDEMEYER, SP. J., joined.

M. Keith Davis, Dunlap, Tennessee, for the appellants, Leslie Higdon, Jr., and Darlene Higdon.

Keith H. Grant, Dunlap, Tennessee, for the appellees, Chris D. Thornton and Julie Thornton.

OPINION

The subject of this dispute is twelve feet of property located in Sequatchie County, Tennessee. The plaintiffs, Chris and Julie Thornton, purchased the land immediately adjacent to Leslie ("Pete") and Darlene Higdon's property in July of 2004. Following their purchase, the Thorntons attempted to establish their boundary lines in order to obtain a mortgage. A surveyor, Larry Newman, performed surveys in August and September of 2004. During this surveying, a dispute arose between the Thorntons and the Higdons over the boundary located at their northwest and northeast corners, respectively. The Higdons objected to the placement of the boundary line.¹ On April 14, 2005, the Thorntons filed suit to quiet title to the disputed property and to prevent further "encroachment" on their land by the Higdons. The Higdons answered claiming that they had

¹Chris Thornton testified that markers placed at the boundary line were taken down by Leslie Higdon three times. Leslie Higdon denied removing the markers.

good title to the property, and raising the affirmative defenses of adverse possession, prescriptive use, and equitable estoppel. Also in dispute was a drainage tile that was installed by Leslie Higdon and stretches from his property onto the property at issue.

The properties now owned by the Thorntons and the Higdons were previously owned by Willie J. Higdon, who was the grandfather of Julie Thornton and the uncle of Pete Higdon. Willie Higdon acquired a large tract of land in 1975 and thereafter divided the property into several parcels. Over the next few years, he sold various parcels to some of his relatives.

The Higdons' chain of title passed from Willie Higdon to Daniel and Barbara Higdon, and then in turn to Versa Higdon, who was Leslie Higdon's grandmother. In 1984, Leslie and Darlene Higdon entered into a long-term installment contract to purchase the property from Versa Higdon.² The Thorntons' chain of title passed from Willie Higdon to Jerry Higdon, Julie Thornton's father. Jerry Higdon received the land from Willie Higdon on May 22, 1984, and he held title to the property until selling it to the Thorntons in 2004.

The property description in the deed the Higdons received read as follows:

B[eginning] at the northwest corner of the Willie Higdon and wife property as described in Deed Book 38, page 119, in the Register's Office of Sequatchie County, Tennessee, and being in the south margin of a public gravel road and being the northeast corner of the McDaniel tract, thence southwardly with the east property line of said McDaniel property, two hundred twenty eight (228.0) feet to the original southwest corner of the said Willie Higdon et ux tract, thence with Herman Ducker et ux property, and original south property line of said Higdon property, Eastwardly, two hundred one (201.0) feet, thence with Willie Higdon et ux property, Northwardly to the South margin of above mentioned public road, thence with the south margin of said road Westwardly two hundred one (201. [sic]) feet to the point of BEGINNING. This conveyance is subject to any existing easements.

The deed the Thorntons received set forth the following description of their property:

B[eginning] on the southeast side of Bilbrey Ridge Road right-of-way and the corner of the properties presently owned by Willie Higdon and wife, Josephine Higdon and the corner of the property line of John Bilbrey; thence traveling southwardly 275 feet to a stake parallel with the John Bilbrey property; thence traveling 230 feet westwardly to the Versa Higdon properties and a stake; thence traveling 211 feet northwardly to the Bilbrey Bridge Road right-of-way; thence traveling 230 feet parallel to the Bilbrey Ridge Road right-of-way and the point of beginning, and containing 1-1/4 acres, more or less.

²On May 3, 1991, Pete and Darlene Higdon finally received the deed to the property.

On June 7, 2007, a bench trial was held in the Chancery Court of Sequatchie County. The evidence revealed that the boundary line at issue was not clearly marked by a fence, trees, physical structures, or pins. The following represents the testimony presented to the trial court that is relevant to the two issues presented.

Pete Higdon testified that he began the installation of the drainage tile at issue in the late-1980s to prevent flooding on his land. This drainage tile extends between sixty to one hundred feet.

Plaintiffs' surveyor, Larry Newman, testified that he performed his surveys in 2004 for the Thorntons' mortgage company. Newman testified that there were no physical monuments to mark the boundary lines, though he did use old "mag nails," an iron pipe, old fence wire, and old flagging to help determine the other boundaries of the property. He started his survey by determining Leslie Higdon's western boundary line using the calls in his deed. After determining Higdon's western line, he then measured the approximate distance of 201 feet called for in his deed to mark the eastern boundary line. Newman admitted that his final survey lines do not match up exactly with the Thorntons' deed, but stated that he gave Pete Higdon the exact amount of land called for in his deed. Due to the dispute over the twelve feet of land, following his second survey, Newman set both a deed line and a mortgage line.

Defendants' surveyor, Tim Altonen, performed his survey in 2006. Altonen had previously surveyed the land in 2002 for Murphy Argo, whose land bordered Leslie Higdon's on the west. He stated that during the previous survey he had set the iron pin in the northwest corner of the Higdon's property which established the western boundary line.³ Altonen began his survey by using a 1977 survey of the Hopkin's property, which bordered the Thorntons' property on the east. Using this survey as a guide, he established the southeast corner of the Thorntons' property and the southwest corner of the Hopkin's property where an iron pin was found. Then, using the iron pin found in the southeast corner, he projected the line upwards to Bilbrey Ridge Road establishing the northern boundary. He then moved westward 232 feet to establish the northeastern corner.⁴ Based on his survey, the disputed land fell within the Higdon's property. However, he acknowledged that there was approximately twelve to thirteen feet more land than either deed called for on the northern border, and that a different starting point would result in a different boundary line.

The trial court held that the boundary lines should be set in accordance with the survey of Larry Newman, the Thorntons' surveyor. This holding was based on the trial court's findings that the legal descriptions in the deeds from Willie Higdon, and those that followed, were not determinative because there were "no calls" and "there are points of references and there are distances without any direction as to the exactness of how they were prepared or arrived at." The trial court went on to find that there were two possible outcomes for the surveys depending on where

³In fact, based upon this 2002 survey, Leslie Higdon purchased a small portion of property from Murphy Argo along his western boundary.

⁴The Thorntons' deed called for 230 feet along the northern boundary line.

the surveyor started. The court held that the most certain line from which to begin was the northwest corner of Leslie Higdon's property that was established conclusively when he accepted the boundary following the survey of the Murphy Argo tract.⁵ The court then found that the 201 feet eastward set out in Leslie Higdon's deed was properly established by the Newman survey. Therefore, the twelve feet of disputed property would be included in the Thorntons' property.

The trial court then addressed the Higdons' affirmative defense that the Thorntons were equitably estopped to challenge the Higdons' right to maintain the drainage tile.⁶ The trial court found that Pete Higdon had installed the drainage tile with the actual knowledge of the Thorntons' predecessors in title, that Pete Higdon relied on the acquiescence of the Thorntons' predecessors in title as he installed drainage system, and that the drainage system installed by Pete Higdon benefitted both properties. Based on these findings, the trial court concluded that the Thorntons were equitably estopped to challenge the Higdons' right to maintain the drainage tile in its present state. The court, however, ruled that the Higdons had no right to expand the drainage system from its present state.

Both parties appeal. The Higdons contend the trial court erred in awarding the disputed property to the Thorntons. The Thorntons appeal the ruling of equitable estoppel.

ANALYSIS

THE BOUNDARY LINE DISPUTE

"In resolving a boundary line dispute, it is the role of the trier of fact to evaluate all the evidence and assess the credibility of the witnesses." *Mix v. Miller*, 27 S.W.3d 508, 514 (Tenn. Ct. App. 1999) (citing *Norman v. Hoyt*, 667 S.W.2d 88, 91 (Tenn. Ct. App. 1983)). "When determining a boundary line that is in dispute, the court must look first to the natural objects or landmarks on the property, then to the artificial objects or landmarks on the property, then to the boundary lines of adjacent pieces of property, and finally to courses and distances contained in documents relevant to the disputed property." *Id.* at 513 (citing *Franks v. Burks*, 688 S.W.2d 435, 438 (Tenn. App. 1984); *Thornburg v. Chase*, 606 S.W.2d 672, 675 (Tenn. App. 1980)).

The appellate court conducts a *de novo* review of the trial court's decision in a boundary dispute with a presumption of correctness as to the trial court's findings of fact, unless the evidence preponderates against those findings. *Wood v. Starko*, 197 S.W.3d 255, 257 (Tenn. Ct. App. 2006). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999). Where the trial court does not make findings of fact, there is no

⁵The original deeds from Willie Higdon made reference to beginning at the "McDaniel tract" which was on the northwest corner of the property. The court concluded that this likely referenced the current Murphy Argo property.

⁶The Higdons also asserted the defense of adverse possession. The trial court found there was no evidence of adverse possession because there was no "open and notorious or hostile holding of the property."

presumption of correctness and we “must conduct our own independent review of the record to determine where the preponderance of the evidence lies.” *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). We also give great weight to a trial court’s determinations of credibility of witnesses. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). Issues of law are reviewed *de novo* with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999). Mixed questions of law and fact are subject to a different standard of review. *Bubis v. Blackman*, 435 S.W.2d 492, 498 (Tenn. Ct. App. 1968).

A presumption of correctness does not attach to mixed questions of fact and law. *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995) (citing *Murdock Acceptance Corp. v. Jones*, 362 S.W.2d 266, 268 (Tenn. Ct. App. 1961)). Although a presumption of correctness attaches to the trial court’s findings of fact, we are not bound by the trial court’s determination as to the legal effect of its factual findings, nor by its determination of a mixed question of law and fact. *Travelers Insurance Co. v. Evans*, 425 S.W.2d 611, 616 (Tenn. 1968); *Sullivan v. Green*, 331 S.W.2d 686, 692-93 (Tenn. 1959). Our standard of review of rulings on mixed questions of fact and law is *de novo* with a presumption of correctness extended only to the trial court’s findings of fact. *Abdur’Rahman v. Bredesen*, 181 S.W.3d 292,305 (Tenn. 2005) (citing *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004)).

The trial court determined that the deeds passed down from Willie Higdon were poorly drawn and made without reference to surveys, resulting in the current dispute. The lack of physical monuments made the determination of the boundary lines even more difficult. Therefore, the trial court had to base its decision on the adoption of one of the two competing surveys presented by the parties. Both surveyors relied on iron pins, surrounding roads, surveys of surrounding properties, and the distances contained in the parties’ deeds in determining the boundary lines. The trial court recognized that there were two possible boundary lines depending on where the surveyors started. Of special significance to the trial court was the boundary line on the western portion of Leslie Higdon’s land, which had been established during a 2002 survey by Tim Altonen. This survey was the basis for Leslie Higdon’s purchase of a portion of land from Murphy Argo, and thereby established a boundary line between those two properties.⁷ Additionally, the court concluded that this land was the original starting point referred to in the Higdon’s deed, therefore, the survey performed by Larry Newman, which used this line as its starting point, was the most accurate.

The Higdon’s also presented two arguments for the first time on appeal. First, they argued that ambiguities contained in the deeds passed down from Willie Higdon should be construed against the plaintiffs. Their argument rests on the premise that the original western boundary line was uncertain. However, based on the language in their deed, the western boundary line appears certain as it clearly refers to the McDaniel tract, which subsequently became the Murphy Argo property. Additionally,

⁷ See *Mix*, 27 S.W.3d at 514 (citing 5 Tenn. Jur. Boundaries § 19 (1983)) (“A land owner that has recognized and adopted a survey that was conducted with his or her consent may be estopped from challenging the boundaries set forth in the survey”).

as the trial court recognized, the western boundary became clear after the survey by Tim Altonen in 2002, which Leslie Higdon accepted in his purchase of a portion of the Murphy Argo property.

Secondly, the Higdon presented the argument that the plaintiffs' predecessors in title, Jerry and Willie Higdon, had previously acknowledged and acquiesced to the existence of the drainage tile upon their land. Therefore, they argued, this acknowledgment was proof of where the correct boundary line existed. The theory of boundary by acquiescence is a recognized doctrine.⁸ However, the defendants did not plead this theory in their answer or at trial. Instead, they specifically raised the affirmative defenses of adverse possession and equitable estoppel, and pursued these theories at trial. "As a general rule, 'questions not raised in the trial court will not be entertained on appeal.'" *City of Cookeville ex rel. Cookeville Res'l Med. Ctr. v. Humphrey*, 126 S.W.3d 897, 905-06 (Tenn. 2004) (quoting *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983)). Since this issue was not set forth in the pleadings or raised before the trial court, we will not entertain this issue on appeal.

The evidence in the record does not preponderate against the trial court's findings or the conclusion that the Thorntons' survey, which was prepared by Larry Newman, should be adopted and that the disputed property belongs to the Thorntons.

EQUITABLE ESTOPPEL

On appeal, the Thorntons argue that the trial court erred in its finding that the Higdon maintained the right to the use and benefit of the drainage tile.⁹ The trial court found that the drainage tile was installed with "the knowledge and understanding of the other parties in question, both Willie and Jerry Higdon, who preceded the Thorntons in their chain of title." The court found that Leslie Higdon relied on their acknowledgment and expended his time and efforts in putting in the drainage tile. Therefore, under the theory of equitable estoppel, the drainage tile, an encroachment, could remain on the property and the Higdon would retain the right to access the drainage tile in order to maintain and repair the tile. However, they could not expand it from its current state or cause a nuisance.

"The burden of establishing an estoppel rests upon the party who invokes it." *Jackson v. Sappington*, No. W2002-02092-COA-R3-CV, 2003 WL 21756688, at *4 (citing *Jenkins-Subway*,

⁸"[A] boundary line may be established by acquiescence where 'recognition and acquiescence [are] mutual, and both parties...have knowledge of the existence of a line as a boundary line.'" *Davis v. Cuel*, No. E2006-02026-COA-R3-CV, 2007 WL 4548442, at *5 (Tenn. Ct. App. December 27, 2007) (quoting *Duren v. Spears*, 1990 WL 59396, *2 (Tenn. Ct. App. May 10, 1990) (quoting 11 C.J.S., *Boundaries*, §§ 79 and 81 (1973))).

⁹Specifically, the Thorntons contend that the Higdon did not plead equitable estoppel in order to claim the right to use and maintain the drainage tile, but pled equitable estoppel to assert that the Thorntons were estopped from denying the boundary line. We find this argument without merit because the basis for the Higdon's equitable estoppel argument was that the installation of the drainage tile, with the acknowledgment of the Thorntons' predecessors in title, demonstrated their awareness of where the disputed boundary line should be placed. While the trial court found equitable estoppel for a different outcome, it relied on the facts clearly set forth for the alternate theory, and the Thorntons were fully aware that equitable estoppel had been raised as a defense.

Inc. v. Jones, 990 S.W.2d 713 (Tenn. Ct. App. 1998)). As for the *party claiming the estoppel*, the essential elements of an equitable estoppel claim are: “(1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) Reliance upon the conduct of the party estopped; and (3) Action based thereon of such a character as to change his position prejudicially.” *Davis*, 2007 WL 4548442, at *6 (citing *Callahan v. Town of Middleton*, 292 S.W.2d 501, 508 (Tenn. Ct. App. 1954)). The essential elements of an equitable estoppel as related to the *party to be estopped* are:

- (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;
- (2) Intention, or at least expectation that such conduct shall be acted upon by the other party;
- (3) Knowledge, actual or constructive of the real facts.

Id. Equitable estoppel may also be demonstrated by the silence of a party when there was a duty to speak. See *Douglass v. Rowland*, 540 S.W.2d 252, 254 (Tenn. Ct. App. 1976) (citing *Duke v. Hopper*, 486 S.W.2d 744, 748 (Tenn. Ct. App. 1972)); see also *Richardson v. Bristol Land & Improvement Co.*, 1 Tenn. App. 671, 685 (Tenn. Ct. App. 1926). Equitable estoppel applies not only to the party who induced reliance but also to his privies. See *Daugherty v. Toomey*, 222 S.W.2d 195, 196-97 (Tenn. Ct. App. 1949) (citing *LaRue v. Greene County Bank*, 166 S.W.2d 1044 (Tenn. 1942)).

Pete Higdon testified that Jerry Higdon, the Thorntons’ predecessor in title, often stopped to talk to him during his construction of the drainage system, and that he did not complain or state that the tile was encroaching on his land. Pete Higdon also testified that he continued to install and construct the sixty to one-hundred foot long tile drainage system with Jerry Higdon’s knowledge and acquiescence. The trial court found that the drainage system was installed with “the knowledge and understanding of the other parties in question, both Willie and Jerry Higdon, who preceded the Thorntons in their chain of title.” The evidence does not preponderate against the trial court’s findings. We, therefore, affirm the trial court’s ruling that the Higdons have the right to access the drainage system and the right to maintain it in its present location, but they may not expand the drainage system or take any action that would constitute a nuisance.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Leslie (Pete) Higdon, Jr. and Darlene Higdon.

FRANK G. CLEMENT, JR., JUDGE