IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 14, 2009 Session

KINZEL SPRINGS PARTNERSHIP v. HAROLD KING, ET AL.

Appeal from the Circuit Court for Blount County
No. E-21397 W. Dale Young, Judge

No. E2008-01555-COA-R3-CV - FILED JULY 30, 2009

In this action to quiet title, the plaintiff sought the declaration of the true boundary line between the parties, along with an award of the litigation expenses, discretionary costs, and attorneys' fees incurred in protecting the title to the property. Following a bench trial, the court agreed with the property line claimed by the plaintiff. The defendants appeal. We affirm.

Tenn. R. App. P. 3; Judgment of the Circuit Court
Affirmed; Case Remanded.

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J. , joined.

James H. Ripley, Sevierville, Tennessee, for Appellants, B. Gerard Bricks and Barbara B. Bricks.

John T. McArthur, Maryville, Tennessee, for Appellee, Kinzel Springs Partnership.

OPINION

I. BACKGROUND

Jeff E. Bailey and Kenneth R. Maples are the owners and general partners of Kinzel Springs Partnership ("Kinzel Springs"). Approximately nine years ago, Kinzel Springs purchased 536 acres in Blount County, Tennessee, from Kinzel Springs Trust. A portion of the property purchased borders a development known as Laurel Valley.[1] Within Laurel Valley is the Fairlight Subdivision. The present controversy arose in the Fall of 2005, when Kinzel Springs discovered that a concrete

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[1]The property comprising the lands of the parties consisted originally of 2,954 acres and was conveyed by grant from the State of Tennessee to George Snider in 1836. One of the corners called for in the original grant is a beginning point of the boundary line at issue, described in the grant as "a pine on the top of a ridge." This call was carried forward in the descriptions when the property was conveyed. The tracts at issue were divided in 1915, with the Long Branch tract containing the property claimed by Kinzel Springs and the J.W.H. Tipton tract containing the property claimed by Dr. and Mrs. Bricks.

drive and a telephone pole serving a house located in the Fairlight Subdivision encroached upon property it claimed.

The Fairlight Subdivision lot at issue is 27A.[2] The driveway in question was constructed sometime in 1988 or 1989 by Gil Heinsohn, an officer of Regal Real Estate Company ("Regal"). Mr. Heinsohn constructed the drive in order to build the home of Henry and Betty Tappen (the "Tappens") on Lot 27A. In 1991, it was discovered that the Tappens's driveway crossed beyond the recognized boundary of Fairlight Subdivision into an area Mr. Heinsohn believed was still owned by Regal. To rectify the improper placement of the drive, Mr. Heinsohn prepared an easement agreement from Regal to the Tappens.

On May 31, 2005, Dr. B. Gerard Bricks and wife, Barbara B. Bricks (the "Brickses"), purchased Lot 27A from John and Mary Bowling (the immediate predecessors in title). When contacted in late 2005 by Kinzel Springs regarding the boundary issue, the Brickses advised that they claimed an interest in not only the property where the telephone pole and the driveway were located, but all the way to the top of the mountain.

After attempts at resolution of the boundary line controversy failed, on August 3, 2006, Kinzel Springs filed a complaint to quiet title against the Brickses and Harold King (successor in interest of the assets and liabilities of Regal, which is now defunct) individually and as Trustee of the Harold G. King Revocable Living Trust King Trust (created on May 31, 1996, and amended and restated on July 6, 2005) (collectively the "King Parties"). The complaint further requested a declaration as to the true property line.[3]

Prior to the initiation of this action, on July 31, 2006, the Brickses obtained a quitclaim deed from the King Parties for the alleged Laurel Valley "common area" property at issue. They recorded the quitclaim after the lawsuit was filed. Specifically, the quitclaim was for the land lying between the northwest boundary of Lot 27A Fairlight Subdivision as shown in Small Plat Book 5, Page 727 to the top of the ridge. Based on this quitclaim, the King Parties were dismissed from this lawsuit on August 22, 2006.

Proof Presented at Trial

A bench trial was held in September 2007. Mr. Bailey was the first witness for Kinzel Springs. The following testimony revealed the effects of this dispute on Kinzel Springs:

> Q . . . I want you to point out what you all did with regards to Phase 5 and the boundary that you all established for those particular phases and why you did that.

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[2]Sometimes referred to as Lot 27R. This tract represents a recombination of the subdivision's original Lots 27-35.

[3]The complaint also raised an issue concerning the 1991 easement. Kinzel Springs averred that the easement was granted in error, was legally void, and was without force and effect on its property. According to Kinzel Springs, Regal did not own the property at the time it granted the easement to the Tappens.

* * *

A It's these three lots right here, 98, 99, and 100, that actually touch the area in question.

Q And why did you instruct Mr. Younger to put the line of those particular lots at that location?

A What we do typically and what the Planning Commission usually requires is that there be no gaps or remnants or leftover areas between either two phases that we own or between the exterior boundary of the development. So I went to the Planning Commission, . . . and told . . . we had a situation that we were working to resolve because there appeared to be a driveway and a telephone pole on us, that we did want to record Phase 5. So after discussing the situation with Mike Garner, surveyors and others, that instead of running those three lots to the boundary of – to our boundary, and potentially involving a sale that would put it off on a buyer to try to resolve this issue since we were very well aware of it, we pulled back and platted those lots to keep them out of the disputed area and took it on ourselves to resolve it.

* * *

A We promised [the buyers] verbally that when this was resolved we would extend their property lines in a straight line to the northern boundary of Fairlight.

Q And have you had other interested parties and other contracts with regards to other lots in Phase 5?

A We have a contract right now with a couple that we've had for –

> MR. RIPLEY: Your Honor, please, I would like to object. I don't think the issue of whether they have contracts pending or anything else is really relevant to the question of where this boundary line is.
>
> MR. McARTHUR: Your Honor, I think to the extent that they have placed a cloud on our title, it is relevant and the impact it has on my client and their development.
>
> MR. RIPLEY: Your Honor, I maintain the same objection . . . . [T]he sole issue before the Court today – this isn't a slander of title case, it's a boundary case. The sole issue before the court is where is this boundary line. . . .
>
> THE COURT: I respectfully overrule the objection.

Mr. Younger, a surveyor who has worked extensively in the subject area and who prepared the 2000 perimeter survey for Kinzel Springs, testified, inter alia, as follows regarding the boundary between Kinzel Springs and the Laurel Valley development:

> A . . . [B]ased on the deeds, we compared them with Laurel Valley deeds and I found that they matched both in bearing and distance. And we also took the previous surveyor who first divided this property, Everett, in the seventies, and found his pins and used those, the same lines according to Fairlight Subdivision in the courthouse. It comes up to be the northern line of Fairlight Subdivision.
>
> * * *
>
> Q . . . [W]hat is that bearing and distance?
>
> * * *
>
> A Northeast fifty-seven, thirty-nine, forty-five, nine hundred and thirty-eight point one five feet.
>
> Q Okay. And is that the same line that is reflected on the earlier exhibits, including your perimeter survey for Kinzel Springs, the Fairlight Subdivision, and all of the Lot 27R replat?
>
> A Yes, sir.

This lawsuit involved numerous surveys prepared by Mr. Younger. He testified further regarding his inconsistent positions in regard to the boundary line at issue:

> Q Tell the court about [your] mistakes [in this area]. . . .
>
> A Well, when we started the FDIC [work,] the beginning point of our survey was this same area. We had two crews involved in it. I wasn't out in the field that much. And we instructed them to locate the ridgetops, to find any monuments, fences, pins, or anything they could. After a few days of checking on them, we found that they had actually set pins, instead of – they set pins along the ridge and on through there. Then we got a call from the FDIC who told us to halt in that area because it wasn't going to be clear title, and to skip that part and move on down further to the park line.
>
> Q At that point had your surveyors done anything to establish whether or not that was a proper boundary between the FDIC property which later became Laurel Valley and Kinzel Springs?
>
> A No, sir.

Q They had simply been instructed to mark the ridge top; is that correct?

A Uh-huh (affirmative).

Q After you were pulled off of that area, did you or your crews remove those pins?

A No, we did not.

Mr. Younger testified that in 1991, he was contacted by Mr. Heinsohn regarding the Tappen easement. Mr. Younger prepared a drawing regarding the area in dispute, on which the Brickses place much emphasis:

> A . . . Mr. Heinsohn came to me and wanted me to give him a drawing of an easement going through this area to get to another lot on the other end of Fairlight Subdivision. It was just – it wasn't a survey, and I don't think we even stamped the drawing. It was just a show and tell document, and I found out it was recorded when all this came about. That was in '91.
>
> * * *
>
> Q This particular exhibit you prepared, tell me what instructions you were given and what you did as a result of those instructions back in 1991.
>
> A We were just asked to do a paper survey showing an easement joining along the ridge line going to another lot.
>
> Q Okay. Did you physically go out and actually survey that?
>
> A No, sir.

According to Mr. Younger, the error caused by the 1991 drawing surfaced in 2004:

> A We did some [work] in '04. That's when we realized we had the problem. . . . Anything before . . . never had been on the ground, just paper stuff.
>
> * * *
>
> A . . . [T]his drawing is a mortgage loan survey we had done. I assume it was when the Bricks[es] were going to buy the property. And we sent off – there is another one before this that doesn't have an easement. They sent this back saying, "I want you to take the easement and put it on there." It was just brought up in the computer and put it on there and that was what created this document. I don't know if this is signed or not, it's not stamped. Then right after this there is a mention about trying to buy

the property, sell that area, and that was when we finally realized we had a problem. That's when we started researching it and actually found out that the Kings didn't own that.

* * *

A Actually – it was actually done in the late nineties but it was brought over and combined in [2004]. It's just a copy of two surveys and we just put them together.

* * *

Q Okay. How do you explain that you were providing a survey in 2004, four years after the 2000 survey you did for Kinzel Springs, that reflects the line as being the straight line?

A Well, this information was – like I said, it was in '91. We hadn't done any legal work or any surveys of that ridge. We made a mistake [in 1991] by putting that as a boundary line. We brought it over [in 2004] and once we brought it over that's when we realized we had a problem, so this actually was done prior to 2000 as far as the data here.

Mr. Younger opined that the common boundary between Kinzel Springs and the Brickses, "based on the deed evidence and field evidence, the pins in the field . . . [is] the northern line of 27R recorded in the Fairlight Subdivision plat." On cross-examination, he testified that "[t]he recorded plat [for the subdivision] doesn't show anything to the north of Fairlight, any common area. In fact, it's designated as not common area by lines." He did note that "one of the deeds tells us to leave the stake and pine stump and it says, "Thence along the ridge." On redirect, however, Mr. Younger reiterated that the plat prepared by Harve Everett did not reflect any common area north of the Fairlight Subdivision. He further testified as follows:

Q . . . [I]s there any evidence, to your knowledge, that there is any common area that belonged . . . to Laurel Valley, or to Regal Development, north of the disputed line[] here, north of the Lot 27R line?

A No, sir.

On re-cross, Mr. Younger asserted that he did not find the geographic features (i.e., the gaps) to be controlling because he found the pins that matched "the same calls as Harve Everett's plat of Fairlight Subdivision."

Joe Brown, another registered surveyor, reviewed the relevant deeds and documents and testified as to his opinion that "[t]he line between Kinzel Springs and the replat of Fairlight Subdivision" is consistent. Mr. Brown noted further that his research in the tax assessor's office

revealed that "[t]he only time that the common area came about was in 2006." According to Mr. Brown, prior to that time, the records showed a straight line call consistent with the calls of the replat of Lot 27R. He stated the following:

> Q In researching your tax information, did you have discussions with the tax assessor or the record keeper?
>
> A Yes, sir, limited discussions.
>
> Q And did you ask them to produce for you the plats related to this area in dispute?
>
> A Yes, sir. I pulled the Fairlight Subdivision plat from the Register's office.
>
> Q And did you discuss with him whether or not there was any area between Fairlight and Kinzel Springs reflected on either of these maps as being a remnant piece of property?
>
> A There was small discussion. It was pretty obvious from the tax maps and the subdivision plat that there was no – it did not reflect any remnant property.
>
> * * *
>
> Q Based upon your experience as a surveyor and reviewing these tax records, would you have an opinion about [who] paid taxes for property north of the line reflected in the two previous tax deeds, tax maps?
>
> A Kinzel Springs.

Mr. Brown provided additional testimony regarding the deeds at issue:

> Q . . . [D]id you compare the 1915 deeds with the calls of more modern deeds with regards to this common line?
>
> A They show the same bearing and distance.
>
> Q And from a surveying standpoint, is there any significant difference in those two lines that were called for back in 1915?
>
> A Other than coming from a different direction, no.
>
> Q Okay. With regards to the small plat book which is reflective of Lot 27R to Lot 27A subdivision or replat, were those common calls back in the 1915 deeds also consistent with the call reflected in the replat?

A Besides not going the entire length, the fourteen hundred and nineteen feet, the angles are very similar.

Q Okay. And what about the subdivision that was done by Harve Everett of the Fairlight, did you compare it to those common lines?

A Yes, sir, I did. And also the angular is very similar.

* * *

Q What significance, if any, do you place on the call and the one deed along the ridge to a stake?

A Well, I just place it as just that, along the top of that first call. If you go with the ridge, the entire length, you'll have a house straddling the ridge. If you go the straight line distance, the house will be sitting on the proper property.

* * *

Q . . . [I]f you'd followed the ridge line within that same period or same distance, would it have gone through a house?

A Yes, sir.

* * *

Q What significance, if any, did you place upon remnants of fence that were located in that area?

A I really didn't place much emphasis on it because it was not mentioned in any of the deeds. It was very sporadic and difficult to find. It was in pieces of old trees, just approximate locations of it. And, like I said, it wasn't mentioned in any of the deeds.

Q Did you use in making your determination the pecking order, basically, that is used by surveyors in determining?

A Yes, sir, first I looked at natural monuments, and it makes mention to along the top and just for the first call. I don't dispute it goes along the top of a six and six-tenths chain. After that it goes to artificial monuments. I found corners at both ends of the fourteen hundred – at the forty-three chains line. Then I looked to adjoining properties, both of which match the calls all the way back to the 1915 deed, and then courses and distance and got a pretty good match there.

Q Did any of the deeds that you know of refer to the fence line?

A No, sir.

Q How would you, as a surveyor, properly call or describe the lines that followed a ridge line?

A I would say thence with the meanders of the ridge, thence with the meanders of the top.

Q Did you find any reference in any of our deeds or any of the chains of a meanders call along this line?

A No, sir, I did not.

On cross, counsel for the Brickses inquired of the witness as to why a steep hill side, ranging 22 to 85 feet from a prominent ridge, would have been used to situate a boundary in 1915. Mr. Brown replied that he was "not sure why they did that," but maintained his opinion that the true boundary between the parties is the Fairlight Subdivision line.

Mike Garner, a title attorney, informed the court that he, too, had determined that the common boundary between Kinzel Springs and the Brickses was the northern boundary of Lot 27R of Fairlight Subdivision. He noted as follows regarding the deeds of Fairlight Subdivision and Kinzel Springs:

Q So that is the identical call to the calls from the earlier deeds?

A They're corresponding calls. So the Fairlight plat along that boundary has corresponding calls to the Kinzel Springs Partnership deed.

Q And what is the significance from a title lawyer's standpoint about the recording of the Fairlight Subdivision?

A Well, of course, the recording of the Fairlight Subdivision – from the corresponding calls it would appear that that is a perimeter of the property. And when you look at the Fairlight Subdivision plat agreeing with the calls of the Kinzel Springs deed and also the corresponding calls of the earlier deeds, then, of course, you would have the common boundary line with the north line of Fairlight Subdivision.

Q And is that a line that's been recognized, at least since the recording of that particular plat?

A Well, this plat, it may have been '72, but it was actually recorded in May of 1973.

Q Okay.

> A So it's been down on record for a long time. And, of course, there's been a lot of talk in this whole litigation about a common area that is on the other side, in other words, the north, on the north boundary. . . . I've been able to find no evidence as far as any tax assessment for any property outside the northern boundary of Fairlight Subdivision from the tax maps.

He testified further as follows:

> A . . . So I feel like that, in my opinion, that based on what I found in the tax maps and the records and the trustees' office and property assessor's office is that Kinzel Springs has been paying taxes on this disputed area for a long time.
>
> Q Did your research indicate that they had paid taxes on that area in excess of twenty years, they and their predecessors?
>
> A Yes.
>
> Q Is there any evidence from your research, Mr. Garner, that would indicate that the Bricks[es] or their predecessors in title were paying taxes on this disputed area?
>
> A No.

Mr. Harrelson, a registered surveyor, provided the first testimony on behalf of the Brickses. He concluded that "the division line" was the fence line. Mr. Harrelson noted that he did not walk the deed line calls because he believed them to be incorrect. He observed as follows:

> A I'm still suggesting that the top of the ridge is the boundary, but the fence is a continuation, like I say from the survey I did of Waters, all along . . . it's on or near the top of this ridge, and it goes all the way to the big gap."

Consistent with the position of the Brickses, Mr. Harrelson expressed disbelief that, in 1915, a dividing line would have been run along a steep side hill instead of along the ridge top. He agreed that the Fairlight Subdivision line is determinable. However, as to the boundary between Kinzel Springs and Laurel Valley, he did not believe the deed call and the deed line were "one and the same." He admitted that "if the court finds that . . . the boundary is the ridge top, it goes right through the Williams' house. . . ."

As to the tax issue, Mr. Harrelson contended that it would be impossible to determine whether there has been a payment of taxes by Kinzel Springs or Laurel Valley of this 1.1 acre area in dispute by the use of tax maps. On cross, however, he acknowledged that the best evidence of who paid taxes on the property is the tax maps.

Charles H. (Hank) Freeman, another registered surveyor, testified that he has "been on the ground" on the land at issue on three or four occasions, actually walking the Fairlight Subdivision line. He opined that the Fairlight line is not the dividing line between the parties, "bas[ing] [his] opinion on the wording in the deed, which says, "Thence along the top." As support for his conclusion, he noted

> . . . [t]he physical evidence that we found on the ground that seems to perpetuate the ridge as the boundary line, . . . [such as] the location of this old fence, the path that is going down showing usage. Also, there [are] some marked trees at a couple other locations, one of which has ancient marks on the tree.
>
> Q And those ancient marks on the tree are on the ridge top?
>
> A That is correct.

Mr. Freeman observed that "if you use the calls on the deeds, you wind up at [one] location, and the deed gap is at [another] location, so you are approximately sixty feet south of the deep gap. . . ." He also noted that if you use the Fairlight Subdivision line, "you'll miss the gap to the south by extending that line." He believed that the boundary between Kinzel Springs and Laurel Valley was expressed by the "one call along the top." Mr. Freeman admitted on cross, however, that none of the tax maps he reviewed reflected a remnant piece of property.

Jeff McCall, a real estate attorney, examined the title when the Brickses purchased their home. He testified that his interpretation of the deed was

> that the calls continue with the mountains. At nowhere during those series of calls does it say they leave the mountaintop until it gets to the gap, a stake in the gap.

He further opined that "there was no way 'with certainty' to tell which of these parties has paid property tax on that [1.1] acre area." He noted that, for tax purposes,

> the Kinzel Springs property has been defined as Parcel 10 of Map 95. . . . there is nothing that tells us that this [1.1] acre or so that's in dispute has been included in that Parcel 10 through all the years.

On cross, however, Mr. McCall acknowledged as follows:

> Q Okay. Now, when you were discussing with the Bricks[es] the purchase of Lot 27R, you refused to issue title insurance on the encroachment onto the area north of Lot 27R, didn't you, sir?
>
> A Yes.

Q And you did not issue an opinion as to who owned that area north of Lot 27R, did you?

A No, I did not.

Q And you certainly would not, as we sit here today, pass title on that property, would you, sir?

A No, I would not.

Q And I believe when I questioned you in depositions, you did not have an opinion as to who would [have] paid the taxes on the disputed area?

A No, I did not.

* * *

Q Did you find a tax map that represented a remnant piece of property that would be this disputed property on any of the tax maps?

A No, I did not.

* * *

Q And as far as where the boundary lies between these two parties, you have not expressed any opinion about that, have you?

A That is correct.

Mr. Heinsohn related at trial his involvement in the development of Laurel Valley and his role as project director of Regal. He recalled that he employed Mr. Younger to survey the property before any construction took place. He testified that based on Mr. Younger's work for him, it had been his understanding that Regal owned the land immediately above the Fairlight Subdivision "all the way to the ridge top." Mr. Heinsohn stated that when Mr. Younger informed him that the Tappen driveway was located on property owned by Regal, the easement was drawn up to "fix it." He admits, however, that "the deed Regal . . . got out of the Resolution Trust Corporation did not describe . . . deed calls that went to the top of the ridge except in the northeast corner . . . ." (i.e., the northeast corner of what is now the Brickses' property). He expressed his belief, however, that the ridge top is the boundary. On redirect, Mr. Heinsohn disputed that Kinzel Springs has paid the taxes on the property in dispute. He noted that no representative of the predecessor in title to Kinzel Springs had ever complained about the work being done in the area north of Fairlight Subdivision.

Bob Rusk, a long-time land management consultant and registered surveyor, testified that the descriptions in the deeds conflicted. Because of this occurrence, he applied the "pecking order." His ultimate opinion in this case was the following:

> A I really believe that the intent of the parties when this thing was done was to go from that original grant corner, which is now lost, and follow the top of the ridge all the way down to the point at which the same family had already sold substantial acreage off, and on that particular boundary where they sold it off, and those calls are in the deeds, the deeds to both tracts, it said, "Thence with the meanders of the mountain." . . .

Mr. Rusk related that the most reliable monument is the deep gap and observed that "you don't even get there if you follow the metes and bounds description that's there." He noted that "the intent was to go with the top of the mountain." He opined that Mr. Everett's plat represents a carve out from the larger Laurel Valley tract. According to Mr. Rusk, Mr. Everett was not attempting to describe the boundary between the larger tracts when he laid out the northern boundary of Fairlight Subdivision.

Ruling of the Trial Court

On December 3, 2007, the trial court issued its memorandum opinion, in which it held that Kinzel Springs had carried its burden of proof and that the Brickses' counterclaim should be dismissed. The court later entered an order incorporating the memorandum opinion as the ruling of the court. To summarize, the trial court found as follows:

> • Kinzel Springs' proof established by a preponderance of the evidence that it and its predecessors in title had paid the real property taxes for more than twenty years on the property in question and, thus, it was entitled to the benefits of the provisions of T.C.A. § 28-2-110;
>
> • The Brickses' own expert witness had refused to issue title insurance on the disputed property in question, all prior to the purchase of the real property by the Brickses;
>
> • The Brickses were on notice even prior to the purchase of the real property in question that there existed serious and substantial questions about ownership of the property;
>
> • The Brickses' acceptance and recording of the quitclaim deed from the King Parties constituted a cloud on the title of Kinzel Springs;
>
> • The Brickses failed to prove all the necessary elements required to establish either offensive or defensive title under the common law or statutory doctrine of adverse possession; and

- The Brickses failed to prove all the necessary elements required under the common law of prescriptive easement.[4]

The trial court specifically found as follows:

> Based on the foregoing, the Court is of the opinion and finds that the common boundary between Complainant and Defendant in the area in controversy is a straight line call of North 57-39-45 East 938.15 feet, all as shown in Small Plat Book 5, page 727 at the Registers Office for Blount County, Tennessee, which call agrees with the deed calls in both the Defendants' (Warranty Deed Book 2060, page 298) and Complainants' (Warranty Deed Book 642, page 815) deeds.
>
> The title to the property north and west of the line referenced above is vested in the Complainant and the Defendants are hereby divested of any and all right, title and interest in and to said property and the title to said property is hereby quieted in favor of the Complainant and against the Defendants.
>
> The Court further finds that the purported grant of a 25 foot easement across the disputed area to one of Defendants' predecessors in title is void.

The issue of the amount of attorneys' fees was bifurcated and heard after the trial. The court held that Kinzel Springs was rightfully entitled to its reasonable attorneys' fees and costs necessary in bringing this action as special damages given the cloud on its title placed by the filing of the quitclaim deed by the Brickses. The trial court awarded discretionary costs to Kinzel Springs in the amount of $3,972.90, and further held that Kinzel Springs was entitled to an award of attorneys' fees and litigation expenses. A final order was entered adopting and incorporating the prior orders and awarding Kinzel Springs the sum of $79,532.96 in attorneys' fees and expenses.

The Brickses filed a timely appeal.

II. ISSUES

We restate the issues presented as follows:

A. Whether the trial court erred in finding that Kinzel Springs is entitled to the benefit of T.C.A. § 28-2-110 (relating to payment of real property taxes), so as to bar the claim of the Brickses to the disputed land, and, as a result, determining that the

[4] Such an "easement arises when a use, as distinguished from possession, is adverse rather than permissive, open and notorious, continuous and without interruption, and for the requisite period of prescription." *Cumulus Broadcasting, Inc. v. Shim*, 226 S.W.3d 366, 378 (Tenn. 2007). The requisite period of time of continuous use and enjoyment for a prescriptive easement is 20 years. *Town of Benton v. Peoples Bank of Polk County*, 904 S.W.2d 598, 602 (Tenn. Ct. App. 1995).

common boundary line between Kinzel Springs and the Brickses is the northern boundary of the Brickses' Lot 27A – not the ridge top or the ancient fence running therewith;

B. Whether the Brickses have established by clear and convincing evidence that they are entitled to ownership of the area in question by adverse possession;

C. Whether the trial court erred in allowing Kinzel Springs to recover as special damages its fees and costs incurred in removing the cloud placed on its title by the Brickses' quitclaim deed and whether fees and costs incurred on appeal should be awarded Kinzel Springs as well.

III. STANDARD OF REVIEW

This case was tried by the court without a jury. Our review, therefore, 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); *Boarman v. Jaynes*, 109 S.W.3d 286, 289-90 (Tenn. 2003). 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).

IV. ANALYSIS

A. PROPERTY TAXES & BOUNDARY LINE

The trial court found that the proof before it established by a preponderance of the evidence that Kinzel Springs and its predecessors in title had paid the real property taxes on the property in dispute for more than 20 years. Accordingly, the court determined that Kinzel Springs was entitled to the benefit of the provisions of T.C.A. §28-2-110(a). The Brickses argue that the trial court improperly applied the presumption of ownership established in T.C.A. § 28-2-109.

T.C.A. § 28-2-109 creates a legal presumption that arises from the payment of taxes:

> Any person holding any real estate or land of any kind, or any legal or equitable interest therein, who has paid, or who and those through whom such person claims have paid, the state and county taxes on the same for more than twenty (20) years continuously prior to the date when any question arises in any of the courts of this state concerning the same, and who has had or who and those through whom such person claims have had, such person's deed, conveyance, grant or other assurance of title recorded in the register's office of the county in which the land lies, for such

> period of more than twenty (20) years, shall be presumed prima facie to be the legal owner of such land.

T.C.A. § 28-2-109 (2000). Tennessee courts have held that "if a party has paid taxes continuously for more than twenty years and has assurance of title that has been of record for more than twenty years, a rebuttable presumption of ownership arises. . . ." *Jack v. Dillehay*, 194 S.W. 3d 441, 449 (Tenn. Ct. App. 2005) (quoting *Corrado v. Hickman*, 113 S.W.3d 319, 324 (Tenn. Ct. App. 2003)).

T.C.A. § 28-2-110(a) contains a related provision that prevents a person who has not paid taxes from bringing an action to claim ownership of the property at issue:

> Any person having any claim to real estate or land of any kind, or to any legal or equitable interest therein, the same having been subject to assessment for state and county taxes, who and those through whom such person claims have failed to have the same assessed and to pay any state and county taxes thereon for a period of more than twenty (20) years, shall be forever barred from bringing any action in law or in equity to recover the same . . . .

T.C.A. § 28-2-110(a)(2000).

In *Jack*, 194 S.W.3d at 450, this court noted that § 28-2-110 has been applied to remove cloud on title. *See Tidwell v. VanDeventer*, 686 S.W.2d 899, 902 (Tenn. Ct. App. 1984) (citing *Lee v. Harrison*, 270 S.W.2d 173 (Tenn. 1954)). Parties attempting to rely on § 28-2-110 "must clearly show that the other party failed to pay the taxes." *Bone v. Loggins*, 652 S.W.2d 758, 761 (Tenn. Ct. App. 1982). Although T.C.A. §§ 28-2-109 and 28-2-110 provide the basis for a prima facie case of ownership, the presumption is rebuttable.

The Brickses rely on the Supreme Court's recent decision in *Cumulus Broadcasting, Inc. v. Shim*, 226 S.W.3d 366 (Tenn. 2007). In *Cumulus*, our Supreme Court observed as follows:

> Because tax maps are for the purpose of showing the plats upon which parties have paid taxes rather than establishing boundaries, a "slight overlap" would rarely have any effect on an evaluation for tax purposes. Tennessee Code Annotated section 28-2-110 was enacted in order to facilitate the collection of property taxes based upon property evaluations. . . . Because tax maps do not identify precise boundaries and actual boundaries are established by intent, the Defendant Shim cannot prevail. Tennessee Code Annotated section 28-2-110 should not serve as a bar to a claim of adverse possession when the tracts are contiguous, a relatively small area is at issue, and the adjacent owners making claims of ownership have paid their respective real estate taxes. To hold otherwise would effectively eliminate the adverse possession of any part of an adjoining tract.

Id., at 381 (citations omitted).

Kinzel Springs relies on the following facts and proof in the record:

There is no evidence that Laurel Valley Property Owners Association, Inc., or anyone else in the Laurel Valley chain of title, paid taxes on the disputed area north of the Lot 27A line until the Brickses recorded their quitclaim deed in 2006.

The prior tax maps reflect that Kinzel Springs Partnership and its predecessors in title paid taxes on the disputed area as evidenced by the fact that the tax maps prior to 2006 reflected no remnant property between the boundary of Lot 27A and the Kinzel Springs tract.

"Unlike this [c]ourt, the trial court observed the manner and demeanor of the witnesses and was in the best position to evaluate their credibility." *Union Planters Nat'l Bank v. Island Mgmt. Auth., Inc.*, 43 S.W.3d 498, 502 (Tenn. Ct. App. 2000). The trial court's determinations regarding credibility are accorded considerable deference by this court. *Id.; Davis v. Liberty Mutual Ins. Co.*, 38 S.W.3d 560, 563 (Tenn. 2001). Consequently, a trial court's credibility determinations are binding on this court unless the evidence preponderates against them. *Mix v. Miller*, 27 S.W.3d 508, 514 (Tenn. Ct. App. 1999). This deference extends to a trial court's decision between competing surveys. *See id.*

The evidence presented at the trial does not preponderate against the finding of the trial court that Kinzel Springs and its predecessors in title had paid the taxes on the property at issue for more than 20 years as evidenced by the tax maps and records prior to 2006 which did not reflect remnant property of Laurel Valley north of the Fairlight boundary in the disputed area. Neither the Brickses nor their predecessors in title paid any taxes on the property at issue until such time as the quitclaim deed was recorded in 2006. Thus, the evidence before the trial court on this issue clearly established the failure of the Brickses and their predecessors in title to pay the taxes. Kinzel Springs is entitled, therefore, to a rebuttable presumption of ownership of the property under § 28-2-109 and the Brickses are barred under § 28-2-110 from bringing any action in law or equity such as the relief sought in their counterclaim. Accordingly, we affirm the dismissal of the Brickses' counterclaim.

While the Brickses are precluded from bringing their counterclaim by T.C.A. § 28-2-110, they still may defend their claim to title in Kinzel Springs' lawsuit. *See Burress v. Woodward*, 665 S.W.2d 707, 709 (Tenn. 1984) (A party is "restricted under the statute from bringing suit because of failure to pay taxes for a period of more than twenty years. However . . . 'nothing in § 28-2-110 prevents Defendants from defending their title.'") (citation omitted).

As to the proper location of the common boundary between the parties, Kinzel Springs' position is that it is a straight line as set forth in the deeds and is the common line with Lot 27A. Kinzel Springs relies on the following facts and proof in the record:

A. The two deeds prepared and recorded in 1915 on the same day – one describing the J.W.H. Tipton Tract and one describing the Long Branch Tract – contain calls that reflect the location of the common boundary in the disputed area. They have the same bearings although they are coming from different directions. The boundary line description from these 1915 deeds in the disputed area are essentially identical.

B. The survey of the Fairlight section of Laurel Valley recorded in the Register's Office for Blount County, Tennessee, on May 25, 1973, reflects the northern boundary of Fairlight Subdivision, Lots 27 through 35, and is the same straight line call contained in the original 1915 deeds though the distances have been converted from chains to feet.

C. A replat of Lots 27 through 35 of Fairlight Subdivision performed by Mr. Younger and recorded in Small Plat Book 5, page 727, in 1997, reflects the same straight line call in the area at issue.

D. Should the court find the ridge top to be the proper boundary as suggested by the Brickses, other homes in the Laurel Valley area would be significantly impacted. Such a line will go right through the middle of some existing houses if the property line is determined to be as the Brickses argue.

The Brickses claim that the ridge top is the boundary line between Laurel Valley and Kinzel Springs. They argue that Kinzel Springs improperly based its case on courses and distances – accorded the least weight in the "pecking order" of evidence[5] – so as to suggest that an arbitrary straight line, in places less than 25 feet from the ridge top, along the side of a mountain in steep terrain, is the intended boundary. They assert that it is ludicrous to claim that a boundary line which originates at a point on the ridge would leave it but run parallel with it as close as 22 feet – only to rejoin the ridge on the other end. In support of their position, the Brickses argue the following points:

A. Old deeds were commonly drawn to reflect ridge tops as dividing lines.

B. There are remnants of old fence along the ridge top.

C. In the late 1960s, "Tater" Sparks' father apparently logged the Laurel Valley area and loaded his logs on the top of the ridge.

D. There are a number of surveys prepared by Mr. Younger before and after the 2000 survey for Kinzel Springs which reflect the boundary as being the top of the ridge as alleged by the Brickses.

The issue of where the boundary line called for in the deeds is located on the surface on 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 v. Chase*, 606 S.W.2d 672, 675

[5] In order to retrace the steps of the original surveyor in the determination of 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 v. Chase*, 606 S.W.2d 672, 675 (Tenn. Ct. App. 1980).

(Tenn. Ct. App. 1980). 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). Thus, we will not disturb the trial court's judgment unless the evidence preponderates against it. *Id.*

At trial, the court found that the easement from Regal to the Tappens and the quitclaim deed from the King Parties to the Brickses were void because the predecessors in title did not have any right, title and/or interest in the property in dispute to convey. Based on our review of the entire record, we conclude the evidence does not preponderate against these findings and the trial court's determination that the rebuttable presumption created by T.C.A. § 28-2-109 was not overcome by the Brickses. Accordingly, the trial court properly determined that Kinzel Springs owned the disputed property in question. The trial court heard the testimony, examined the exhibits, and weighed the evidence using the correct framework when making its findings of fact. Based on the foregoing, the trial court held that the boundary of the property was "a straight line call of North 57-39-45 East 938.15 feet, all as shown in Small Plat Book 5, page 727 at the Registers Office for Blount County, Tennessee, which call agrees with the deed calls in both the Defendants' (Warranty Deed Book 2060, page 298) and Complainants' (Warranty Deed Book 642, page 815) deeds." The evidence does not preponderate against this finding.

B. ADVERSE POSSESSION

We next address the claim by the Brickses that they are entitled to the property at issue under a theory of adverse possession.

Adverse possession is the possession of real property of another which is inconsistent with the rights of the true owner. The underlying idea of the doctrine of adverse possession is "that the possession should be maintained in an open and notorious manner so as to warn the true owner that a hostile claim is being asserted to his land." *See Bensdorff v. Uihlein,* 177 S.W. 481, 483 (Tenn. 1915). In order to assert adverse possession, a party must demonstrate that her possession has been exclusive, actual, adverse, continuous, open, and notorious for the required period of time. *Hightower v. Pendergrass*, 662 S.W.2d 932 (Tenn. 1983). In Tennessee, 20 years is the prescriptive period for common law adverse possession without color of title. If the party has adversely possessed the land for the prescriptive 20-year period, title vests in that party. The prescriptive period in Tennessee for adverse possession with color of title is seven years.

Adverse possession is a question of fact. The burden of proof is on the individual claiming ownership by adverse possession and the quality of the evidence must be clear and convincing. *Cumulus*, 226 S.W.3d at 377; *Blankenship v. Blankenship*, 658 S.W.2d 125, 127 (Tenn. Ct. App. 1983). Evidence of adverse possession is strictly construed and any presumption is in favor of the holder of the legal title. *Moore v. Bannan*, 304 S.W.2d 660, 667 (Tenn. Ct. App. 1957).

In 1991, Regal conveyed to the Tappens an easement over the land in question. The Brickses contend that the recorded easement constitutes color of title[6] in and from Regal as a predecessor owner of the tract. While the recorded document does not convey a fee interest, it is of a nature such that it implicitly asserted a fee interest vested in its grantor.

The Brickses contend, in the alternative, that pursuant to statutory law, Kinzel Springs is barred from asserting ownership of the tract based on T.C.A. § 28-2-102 (2000):

> Any person, and those claiming under such person neglecting for the term of seven (7) years to avail themselves of the benefit of any title, legal or equitable, by action at law or in equity, effectually prosecuted against the person in possession, under recorded assurance of title, as in § 28-2-101, are forever barred.

Id. According to the Brickses, their use of the tract, along with that of their predecessors in title, has been actual, exclusive, open, visible, notorious, continuous, hostile, and adverse. *Cumulus,* 226 S.W.3d 366. They cite to the driveway over the tract, constructed in 1988, as an obvious and open use. Given the fact that such uses have existed for a term in excess of seven years, they claim any action to dispossess them is barred.

The trial court found that "the proof failed to establish by a preponderance of the evidence that same was held openly, notoriously and adverse" to Kinzel Springs' interest for the period required by law. The evidence before us does not preponderate against that finding. There is no known proof of any actions of the Brickses or their predecessors in title that clearly established open dominion and control over this mountain property in any sort of exclusive manner sufficient to satisfy the requirements of adverse possession, except the existing driveway and power pole which were constructed no earlier than 1988. Otherwise, the proof is that the property has had no use put to it in the last 20 years. The Brickses did not purchase their property until 2005. Because there is no clear and convincing evidence that the Brickses and their predecessors in title had color of title to the disputed area, they have not met the 20-year time requirement for adverse possession where this lawsuit was filed in 2006.

C. ATTORNEYS' FEES/LITIGATION EXPENSES/DISCRETIONARY COSTS

The trial court awarded Kinzel Springs $79,532.96 in fees and expenses. Such amount was in addition to the sum of $3,972.90 awarded to Kinzel Springs as discretionary costs.

Attorneys' fees are not normally awarded in civil litigation absent a "contract, statute or recognized ground in equity," *State ex rel. Orr v. Thomas*, 585 S.W.2d 606, 607 (Tenn. 1979). An

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[6] Color of title has been described as "something in writing which at face value, professes to pass title but which does not do it, either for want of title in the person making it or from the defective mode of the conveyance that is used." *Cumulus*, 226 S.W.3d 366, 376 n. 3 (quoting 10 *Thompson on Real Property* § 87.12, at 145).

exception to the general rule exists in cases involving libel of title.[7] *Id.* "[O]ne may become liable for libel of title by asserting title in bad faith and without probable cause to the injury of another." *Smith v. Gernt*, 2 Tenn. Civ. App. 65, 80 (1911). 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). A successful claim for libel of title in Tennessee requires proof of the following by the plaintiff: "(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., Apr. 27, 1994)). See also, 53 C.J.S. *Libel and Slander* § 313 (2005).

Statements made with a reckless disregard of the property owner's rights or with reckless disregard as to whether the statements are false may be found to be malicious within the scope of a libel of title action. *Brooks*, 15 S.W.3d at 484. To assert this cause of action, a plaintiff must allege "malice . . . in express terms or [by] any such showing of facts as would give rise to a reasonable inference that [the defendant acted maliciously.]" *Waterhouse v. McPheeters*, 145 S.W.2d 766, 767 (Tenn. 1940). A good faith but erroneous claim of title does not constitute a cause of action for libel of title. *Ezell v. Graves*, 807 S.W.2d 700, 704 (Tenn. Ct. App. 1990)..

The Brickses contend that on numerous occasions, Mr. Younger, the surveyor for Kinzel Springs, reported that the ridge was the boundary and, through a variety of survey plats and drawings, showed a small parcel of "common property" lying between the ridge top and the Fairlight Subdivision. They assert that Mr. Younger indicated that the remnant of property was owned by their predecessors in title. They noted that consistent with this opinion of Mr. Younger, the predecessor in title granted an easement some ten years before the trial in this case. The Brickses argue this is simply a boundary dispute. They assert that they had a good faith belief that the property at issue was within the chain of title of their predecessors.

In its order, the trial court found that Kinzel Springs' prayer for attorneys' fees "falls squarely within the exception to the American Rule carved out by *Ezell v. Graves*, 807 S.W.2d 700." In *Ezell*, the court explained the rationale for permitting recovery in a case involving libel of title:

> When a cloud has been cast upon the title to property . . . 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 losing title by adverse possession. The plaintiffs

[7] This case involves a writing. Thus, we will focus on "libel" of title. What we say about libel of title applies equally to slander of title. As noted in *Phillips v. Woods*, No. E2007-00697-COA-R3-CV, 2008 WL 836161, at *6 n. 4 (Tenn. Ct. App. E.S., March 31, 2008), the action is also sometimes referred to as one for "disparagement of title." Such an action "is a species of a claim for 'injurious falsehood.'" *Id.*

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.

Id.

While Kinzel Springs did not expressly state a claim for libel of title, this issue was tried by acquiescence of the trial court. Attorneys' fees have been sought in this matter since the beginning when the quiet title action was brought. The trial court held as follows:

> One of [the Brickses]' expert witnesses, a most reputable title attorney, refused to issue title insurance on the disputed real property in question, all prior to purchase of the real property by [the Brickses]. Accordingly, the Court finds that [the Brickses] were on notice, even prior to the purchase of the real property in question that there existed serious and substantial questions about the ownership of the property in question.
>
> * * *
>
> After the case at bar was filed, one of the original Defendants, Harold King, issued a Quit-Claim Deed to the [Brickses] for the disputed real estate in question. The Court concludes that said Quit-Claim Deed does, in fact, constitute a cloud on the real property of [Kinzel Springs].
>
> Evidence was introduced during the course of the trial in behalf of [the Brickses] to the effect that one of the predecessors in title retained certain property between the northern boundary of Lot 27 R to the top of a ridge. It was upon this basis that the predecessor in title granted a 25 foot easement across the disputed area to another predecessor in title to [the Brickses].
>
> The Court is not persuaded that the said predecessor in title had any right, title and/or interest in said real property in order to accomplish the conveyance of an easement.
>
> * * *
>
> The Court . . . finds that the purported grant of a 25 foot easement across the disputed area to one of [the Brickses]' predecessors in title is void.
>
> The Court finds that [the Brickses]' acceptance and recording of the Quit Claim Deed from one of the previous Defendants in this case (Trial Exhibit 3) and the subsequent correction Quit Claim Deed accepted and recorded by [the Brickses], constitutes a cloud on the title of the Complainant in the area in dispute as to the real property in question.

> The Court expressly divests [the Brickses] of any and all right, title or interest in and to any real property north and west of the boundary of Lot 27 R as shown by Small Plat Book 5, page 727 at the Registers Office for Blount County, Tennessee. The Court finds that a portion of [the Brickses]' driveway, cable line and utility pole encroach upon the real property of [Kinzel Springs] and the [Brickses] have failed to prove all of the necessary elements required to establish either offensive or defensive title under the common law or statutory doctrine of adverse possession. In addition, the [Brickses] have failed to prove all of the necessary elements required under the common law of prescriptive easement.
>
> The Court takes note of the fact that the Complainants have agreed to grant the [Brickses] an easement for the existing driveway, cable and utility pole encroachment, for the purposes of ingress and egress, electric, utilities and cable as shown by Trial Exhibit 43, but no further or otherwise. Accordingly, the Court finds such an easement in favor of the [Brickses] for the existing driveway, cable and utility pole encroachment for ingress, egress, electric, utilities and cable in the location shown by Trial Exhibit 43, but no further or otherwise.

In this case, the trial court found that prior to the Brickses' purchase of Lot 27A, a well-known and respected title attorney refused to issue title insurance on the disputed property. At that time, the Brickses knew about their title problem in regard to ownership of the tract all the way to the ridge line. The trial court therefore determined that the Brickses were on notice prior to the purchase of the property that there were serious issues concerning the ownership of it. Nevertheless, the Brickses caused to be executed and recorded a quitclaim deed purporting to convey to them the area in question. The Brickses could have held the quitclaim and not recorded it until the conclusion of the action to quiet title resulted in a determination of the ownership of the real property at issue. They clearly knew or should have known the recording of their quitclaim deed from the King Parties would cloud the title to the property in the area at issue in this case. Instead, they recorded the quitclaim and caused Kinzel Springs to go forward to protect its interest. Such action – taken willfully and intentionally – was a clear attempt to exercise control over an area that was not included in the original conveyance of their lot. The Brickses left Kinzel Springs with no recourse other than this litigation to clear the title to the land. Kinzel Springs, like the plaintiff in *Ezell v. Graves*, was forced to hire counsel, take depositions, arrange for court reporters, and run up numerous other expenses. As such, the attorney fees represent an actual pecuniary loss which should be recoverable as special damages according to the *Ezell* court.

Considering the entire body of proof, we cannot say that the evidence preponderates against the trial court's implied finding that the Brickses acted with reckless disregard of Kinzel Springs' rights as a property owner. The evidence also does not preponderate against the trial court's decision that the Brickses failed to act in good faith.

Litigants who successfully defend a libel of title action may recover reasonable expenses incurred in defending that suit. *Ezell*, 807 S.W.2d at 703. These expenses may include, inter alia, attorneys' 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., May 15, 1996). The award of attorneys' fees and costs at the trial level was proper. While Kinzel Springs requests that this court should award them reasonable attorneys' fees and costs incurred in defending this appeal as additional damages under the libel of title claim, we do not find such an award of further damages to be appropriate.

V. CONCLUSION

The proof in this case is that the common boundary between Kinzel Springs and the Brickses is shown as the northern boundary of Lot 27A. The trial court's holding quieting title to all properties north and west of that line and vesting them in Kinzel Springs and divesting the Brickses of any right, title, or interest in that area, is affirmed. We further affirm the trial court's award of attorneys' fees, expenses, and discretionary costs. Thus, we affirm the trial court's judgment in its entirety. This cause is remanded to the trial court for collection of costs below. The costs on appeal are assessed against the Appellants, Dr. B. Gerard Bricks and Barbara B. Bricks.

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JOHN W. McCLARTY, JUDGE