IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 18, 2002 Session

JOHNNY JESS DAVIS, ET AL. v. ESTATE OF JOHNNIE REX FLYNN, ET AL.

Appeal from the Chancery Court for Sevier County
No. 97-1-006 O. Duane Slone, Judge

FILED SEPTEMBER 30, 2002

No. E2001-02480-COA-R3-CV

Johnny Jess Davis and his wife, Linda Diane Davis, sued Johnnie Rex Flynn[1] and his wife, Barbara Flynn, for breach of a written option agreement containing a right of first refusal as to real property in Sevier County. The defendants' answer denies the allegations of the complaint; significantly, it fails to raise any affirmative defenses. Following a bench trial, the court below entered judgment for the plaintiffs in the amount of $851,000. The defendants filed two post-judgment motions; one to amend the pleadings to conform to the proof and another for a new trial or, in the alternative, to alter or amend the judgment. The trial court denied the motion to amend the pleadings, but granted the defendants a new trial. Following a new trial before a different judge, the court below again found for the plaintiffs. This time it awarded them a judgment in the amount of $381,000. The plaintiffs appeal, and both parties raise issues pertaining to both trials. We find the trial court abused its discretion in awarding the defendants a new trial. Accordingly, we vacate the second judgment and reinstate the original judgment for the plaintiffs.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated; Original Judgment for the Plaintiffs in the Amount of $851,000 Reinstated; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J. and HERSCHEL P. FRANKS, J., joined.

Lewis S. Howard, Jr. and Delicia R. Bryant, Knoxville, Tennessee, for the appellants, Johnny Jess Davis and Linda Diane Davis.

L. Caesar Stair, III and Margo J. Maxwell, Knoxville, Tennessee, for the appellees, Estate of Johnnie Rex Flynn by Charles I. Poole, executor, and Barbara Flynn.

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[1] Johnnie Rex Flynn died during the pendency of this matter. The suit was revived against his personal representative.

OPINION

I. *Pleadings/Issues at Trial*

The original complaint was filed on January 10, 1997. In it, the plaintiffs alleged that the defendants entered into a written option agreement with Tommy Bartlett of Tennessee, Inc. ("Bartlett"), by the terms of which the defendants agreed that Bartlett had a "right of first refusal to purchase" a tract of property fronting on U.S. Highway 441 ("the Parkway") in Pigeon Forge, a resort town in Sevier County. The complaint alleges that the option agreement was later assigned by Bartlett and eventually was transferred[2] to the plaintiffs, who recorded it in the office of the Sevier County Register of Deeds.

The option agreement was attached as an exhibit to the complaint. The "right of first refusal to purchase," as pertinent to the facts of this case, provides as follows:

> **Right of First Refusal to Purchase**. Flynns hereby grant to Bartlett for a period from the execution hereof to May 31, 1997, a right of first refusal to purchase as follows:
>
> (a) **Right to Purchase**. If during the said period Flynns desire to sell the Property, they shall give written notice to Bartlett that they intend to do so. Thereafter (but not earlier than 60 days after they have given Bartlett notice of their intent to sell nor later than 6 months thereafter), Flynns may give Bartlett written notice that they have received a bona fide written offer they intend to accept, together with a complete copy thereof. Bartlett then shall have the right to purchase the Property at the price and upon the terms specified in the said bona fide offer. Bartlett may exercise its right to purchase only by written notice given within 10 days after it receives Flynns' notice of intent to sell.
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> (b) **Right to Purchase Exercised**. If Bartlett exercises its right of first refusal, Flynns shall sell and Bartlett shall buy the Property in accordance with the provisions of the bona fide offer.
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> * * *

(Emphasis in original; paragraph numbering omitted).

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[2]The option agreement provides that it "shall inure to the benefit of and shall be binding upon the...assigns of the respective parties and transferees by operation of law." Assignment is not otherwise addressed in the option agreement.

The complaint alleges that the defendants sold the subject property to Pilot Corporation ("Pilot") for $1,999,000, without giving the plaintiffs either of the notices required by the above-quoted portion of the option agreement. Specifically, the complaint alleges as follows:

> The Flynns failed to provide the Plaintiffs with written notice of their intent to sell the Property as required by the Option Agreements and further failed to provide the Plaintiffs with written notice of their receipt of the Pilot Option or of their intent to accept such offer.

(Paragraph numbering omitted). The complaint goes on to allege that "the fair market value of the Property is substantially higher than the amount of consideration received by Defendants from Pilot...." The complaint seeks "judgment against the Defendants for breach of the Option Agreement[]...."

The defendants filed their answer on February 18, 1997. In the answer, the defendants admitted that they entered into the option agreement with Bartlett. As to the allegations of the complaint reciting that the option agreement was subsequently assigned and finally transferred to the plaintiffs, the answer asserts that the allegations are neither admitted nor denied. The answer goes on to recite that the subject property was sold to Pilot but denies that "said sale was in violation of any right of first refusal...." Additional allegations of the complaint are denied. The answer fails to assert any affirmative defenses.

The parties did not amend their pleadings prior to the commencement of the trial on June 1, 1999. Thus, as framed by the pleadings, the plaintiffs alleged a breach of contract action predicated upon the defendants' breach of the option agreement; and the defendants joined issue on the allegations of the original complaint. In general terms, the issues at trial, as presented by the pleadings, were these:

> (1) Was the option agreement, the execution of which was admitted, assigned to the plaintiffs?
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> (2) Did the defendants breach the right of first refusal provision in that agreement?
>
> (3) Were the plaintiffs damaged by the breach?
>
> (4) If so, what is the amount of the damages?

There was no dispute at trial as to the first issue.

II. *History of Proceedings*

This matter was presented at a bench trial on June 1 and 2, 1999. At the conclusion of the proof, Chancellor Bobby H. Capers, sitting by interchange, found the issues joined in favor of the plaintiffs. The court's judgment, entered June 9, 1999, recites that the plaintiffs "had a valid right of first refusal" and that the defendants' sale of the property was "in violation of such right of first refusal." The court awarded the defendants a judgment in the amount of $851,000.

On June 14, 1999, the defendants filed a pleading styled "Motion to Amend Pleadings to Conform to the Proof." Specifically, the motion sought to amend the answer to set up the defense of estoppel. It was the theory of the defendants that the "issue of estoppel was tried by express[] or implied consent." This motion was followed, on June 25, 1999, by another motion, this one styled "Motion for New Trial and/or Alteration and/or Amendment of Final Judgment." The trial court denied the motion to amend the answer; but by order entered October 14, 1999, the court granted the plaintiffs a new trial. The order does not state the trial court's rationale for granting the new trial. However, in its concluding remarks at the hearing on the defendants' motions, the trial court made the following statements, apparently addressed, for the most part, to the plaintiffs' attorney:

> But in fairness to your client, based on what you have told the Court that you may very well have taken a different approach on this matter [if estoppel had been pled], the Court is going to grant this motion for a new trial. I think that's the only fair way to handle it, the only thing I can do in this matter. I think the proof is there to have found adverse to your client, but in fairness to him, if you feel like you would have been able to properly address this defense, then I'm going to give you the opportunity. So the Court is going to grant [the defendants'] motion for a new trial.

Following the granting of the new trial, this matter was assigned to Judge O. Duane Slone. Thereafter, an order was entered permitting the defendants to amend their answer to assert the defenses of laches, estoppel and waiver. A second bench trial, this time before Judge Slone, took place on September 19 and 20, 2001. Using language almost identical to that of the earlier judgment, the court again found the issues joined in favor of the plaintiffs; however, this time the court awarded only $381,000.

III. *Facts*

On June 17, 1977, as a part of a larger real estate transaction, the defendants granted Bartlett several options to purchase different tracts of real property located in Pigeon Forge. The defendants'

personal residence was located on one of these tracts ("the house tract"), and the option to purchase the house tract – containing approximately 3.52 acres – is the subject of this litigation.[3]

Each of the options contained a right of first refusal entitling Bartlett to notice of the defendants' intent to sell the property, as well as notice of any bona fide written offers. Bartlett was granted the right to purchase the tracts at the price and on the terms of any pending offer. These options had a duration of twenty years and would terminate on May 31, 1997. Bartlett promptly recorded these options in the office of the Sevier County Register of Deeds.

In 1982, Bartlett formally changed its name to Water Ski Shows, Incorporated ("Water Ski Shows"). On January 14, 1987, Water Ski Shows transferred its interest in three of the options, including the one as to the house tract, to a newly-created corporation, The Kingdom Resort, Inc. ("KRI"). KRI promptly recorded the assignment. Water Ski Shows subsequently went out of business.

KRI was a corporation with two primary stockholders, one of whom was the plaintiff Johnny Jess Davis. In July, 1989, following substantial KRI financial losses and a personal falling out with his partner, Mr. Davis withdrew from KRI. He and his partner entered into agreements to distribute the partners' interests in KRI. Among the assets received by Mr. Davis and his wife in the distribution was an assignment of the three options, including the option on the house tract. At trial, Mr. Davis testified that, due to the land boom accompanying the opening of Dollywood in Pigeon Forge, he felt that these options could be potentially very valuable. He testified that he so coveted the rights of first refusal to these tracts that he assumed some significant KRI liabilities to obtain them. The assignment from KRI to the plaintiffs was recorded in January, 1991.

In August, 1993, the individual defendants entered into a sales agency contract with a Sevier County realtor to sell the house tract. The defendants made no effort to notify anyone in the chain of title of the house tract option that they had listed the property with a realtor. The defendants initially listed the house tract for $2,500,000. The realtor placed a four-by-eight foot plywood "for sale" sign facing the Parkway, the main street running through Pigeon Forge.

In March, 1995, the defendants received an offer from Conoco, Inc., to purchase the house tract for $1,999,000. The defendants failed to notify anyone of the offer. This offer subsequently lapsed. Shortly thereafter, the defendants received another offer, this one from Pilot. This latter offer also reflected a price of $1,999,000. The defendants accepted the offer from Pilot, and signed an "Option and Purchase Agreement" that granted Pilot an irrevocable and binding option to purchase the house tract. Neither before nor after signing this agreement did the defendants make any effort to contact any party in the chain of title of the right of first refusal option on the house

[3]Due to the rerouting of an adjacent road, the house tract has changed in size and shape since the original grant of this particular option. However, these changes have had no impact on the validity of either the title to, or the validity of the option to purchase, the subject property.

tract. On January 6, 1996, the defendants closed on the sale of the house tract with HGC, Limited, as the assignee of Pilot, and title passed to HGC.

At trial, the plaintiff Johnny Jess Davis provided financial documentation and testified to the fact that at the time of the closing, he was financially able and willing to purchase the house tract for the amount offered by Pilot. He further testified that he would have purchased the tract for that price as he felt the property was undervalued at $1,999,000. Mr. Davis was permitted to testify as an expert on real estate in the subject area, and he testified that he believed that in January, 1996, the house tract had a fair market value of $3,500,000. The defendants' expert testified that the fair market value of the property was $2,600,000.[4]

As a part of the closing process, Pilot retained a title company to research and insure the title to the house tract. The search uncovered the ownership interest of Bartlett in the option agreement as to the house tract and its change of name to Water Ski Shows. The option agreement led the title examiner to the liquidating trustees and shareholders of Water Ski Shows. Apparently, the examiner failed to discover the subsequent assignments, including the one from KRI to the plaintiffs. In any event, the liquidating trustees and shareholders of Water Ski Shows executed a "Release of Option Agreements." Interestingly enough, the next to the last paragraph of the release recites that "[t]he undersigned parties covenant that they have made no assignments of the rights contained in the aforementioned Option Agreements." With the option agreement on the house tract apparently released, the sale to HGC proceeded.

It is undisputed that the plaintiffs were the rightful owners of the option to purchase the house tract and that their interest was properly recorded. At the first trial, the defendants' attorney admitted in opening statement that the defendants had committed what he referred to as a "technical breach" of the option agreement; however, the defendants argued that the plaintiffs were chargeable with culpability in the matter so as to prevent them from recovering.

The respective sides pointed to different background facts in an attempt to guide the court to different conclusions regarding the meaning and consequences of the deficient title search. There is evidence in the record that supports the plaintiffs' claim that the defendants allowed the sale to go forward without informing anyone that Water Ski Shows had assigned its interest in this option and that the defendants possessed actual knowledge of at least some of the transfers beyond the original grantee if not the one to the plaintiffs.

The defendants repeatedly made reference to the fact that upon signing the agreement with Pilot, the realty company that listed the house tract placed a two-by-four foot "sold" sign over the "for sale" sign along the Parkway on the house tract. At trial, the plaintiff Johnny Jess Davis testified that in the ordinary course of his days, he drove by the "for sale" sign daily and that he knew the property was on the market. However, he denied ever seeing a "sold" sign on the property. The defendants simply responded that the placement, size, and length of time the sign was posted refutes Mr. Davis' assertion that he never saw it. The defendants contended that the "sold" sign provided the plaintiff with notice of the pending closing (which did not occur until seven months after the "sold" sign went up) and used this evidence to support the "denial" defenses set up in their answer.

[4]On August 7, 1997, HGC conveyed the house tract to Cracker Barrel Old County Store, Inc., for $2,850,000.

In response to the defendants' claim that the plaintiffs were culpable in this breach, the plaintiffs assigned fault to the defendants. In addition to constructive notice, the plaintiffs alleged that the defendants had actual notice of the plaintiffs' ownership of the option. The chancellor admitted into evidence the sworn deposition testimony of the deceased, the defendant Johnnie Rex Flynn. This testimony addresses Mr. Flynn's understanding of the status of the 1977 options the defendants originally granted to Bartlett. In his deposition, he claimed to have simply forgotten about the option to Bartlett on the house tract. He testified that he knew about the Bartlett name change, but beyond that, as far as he claimed to know, the house tract option had simply "vanished." In addition, since Water Ski Shows had gone out of business, Mr. Flynn testified that he figured the option must have disappeared with that company. He testified that he had no actual notice of the assignment to KRI or to the plaintiffs. In response, the plaintiffs claim that the defendants had actual notice of the assignment because of a conversation that Mr. Flynn had with his attorney.[5]

IV. *Issues on Appeal*

The plaintiffs contend that the trial court abused its discretion in granting the defendants a new trial. The defendants dispute this contention. In addition, they contend that the court should have allowed them to amend their answer to raise the defense of estoppel and should have thereafter dismissed the complaint. Each of the parties raises issues pertaining to the second trial. Because of our disposition of this case, we do not find it necessary to reach any of the issues pertaining to the second trial.

V. *Standard of Review*

Our review of the trial court's judgment is *de novo* upon the record of the proceedings below. Tenn. R. App. P. 13(d). That record comes to us accompanied by a presumption of correctness as to the trial court's factual determinations that we must honor unless the evidence preponderates against those findings. ***Id***. We review questions of law *de novo* with no presumption of correctness. ***Southern Constructors, Inc. v. Loudon County Bd. of Educ.***, 58 S.W.3d 706, 710 (Tenn. 2001).

VI. *Discussion*

A. Motion to Amend Pleadings

The defendants contend that there was proof at the first trial that supports a finding that the plaintiffs are estopped to rely upon lack of written notice in this case. They also argue that the plaintiffs, by their actions, impliedly tried the issue of estoppel.

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[5] At trial, the defendants disputed whether the attorney was acting as their agent at the time of the conversation. This issue was not relied upon by the trial court in its decision.

The defendants' motion to amend the pleadings to conform to the proof relies upon Tenn. R. Civ. P. 15.02, which provides, in pertinent part, as follows:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment;....

They rely most strongly upon the case of ***Zack Cheek Builders, Inc. v. McLeod***, 597 S.W.2d 888 (Tenn. 1980), in which the Supreme Court expounded upon the meaning and application of the rule:

> Generally speaking, trial by implied consent will be found where the party opposed to the amendment knew or should reasonably have known of the evidence relating to the new issue, did not object to this evidence, and was not prejudiced thereby. A succinct statement of this rule appears in ***Browning Debenture Holders' Committee v. Dasa Corp***., 560 F.2d 1078, 1086 (2d Cir. 1977), where it is said that:
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> > In a motion under rule 15(b) to amend the complaint to conform to the proof, the most important question is whether the new issues were tried by the parties' express or implied consent and whether the defendant "would be prejudiced by the implied amendment, i.e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory."
>
> See also ***Saalfrank v. O'Daniel***, 533 F.2d 325, 330 (6th Cir. 1976). The determination of whether there was implied consent rests in the discretion of the trial judge, whose determination can be reversed only upon a finding of abuse. ***Laffey v. Northwest Airlines Inc***., 567 F.2d 429, 478, fn. 370 (D.C. Cir. 1976).
>
> Because of proof problems at trial, the commentators warn that:
>
> > Implied consent . . .is much more difficult to establish (than express consent) and seems to depend on whether the parties recognized that an issue not presented by the pleadings entered the case at trial. A party who knowingly acquiesces in the introduction of evidence relating to issues that are beyond the

> pleadings is in no position to contest a motion to conform. Thus, consent generally is found when evidence is introduced without objection, or when the party opposing the motion to amend himself produced evidence bearing on the new issue. (Parenthetical insert added.) ***Wright & Miller,*** *supra*, § 1493 at 462-63.

Id. at 890-91. *See also* ***Vantage Technologies, LLC v. Cross***, 17 S.W.3d 637, 649 (Tenn. Ct. App. 1999) ("Presentation of evidence that is relevant to both a pled issue and a non-pled issue does not establish trial of the non-pled issue by implied consent.")

In denying the defendants' motion to amend the pleadings to conform to the proof, the trial court found that the issue of estoppel had not been tried by implied consent. We agree. In this case, counsel for the defendants *expressly* stated to the court that his clients were not relying on estoppel. This is clear throughout the transcript. One illustration of this is found in the following exchange between the court and counsel for the defendants during closing argument:

> THE COURT: Now, you are trying to say that, in fact, he is estoppel [sic]....Is that your position?
>
> [ATTORNEY FOR DEFENDANTS]: No, sir. I am saying that he was given notice. And he failed to act upon his notice. The contract requires that upon being given notice that you have got an affirmative duty to --
>
> THE COURT: Well, do you think – Is your defense estoppel and in fact, he should be estopped in claiming notice as defense in this matter?
>
> [ATTORNEY FOR DEFENDANTS]: I am claiming – specifically, technically estoppel? No, I am claiming that he had notice, that the notice was given under the terms of the contract.
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> * * *
>
> THE COURT:...Now, the question is whether or not you are attempting to rely on estoppel as a defense to this claim. And you are saying that you are not?
>
> [ATTORNEY FOR DEFENDANTS]: Not in the pure, technical sense of estoppel. What I am saying is that there was no – is that we

> complied with all the requirements of the notice provision under the option agreement. We did what we had to do....

It is clear from the record that the defendants' theory of defense was twofold: first, that they satisfied the notice requirements of the option agreement by the posting of the "for sale" sign and the "sold" sign at a location near where the defendants had to have seen them; and, second, that the plaintiffs, upon becoming aware of the "for sale" sign and later the "sold" sign, were under an affirmative duty to come forward and advise the defendants of the assignment of the option agreement to them in order – in the words of the defendants' counsel – to "mitigate" their damages. The evidence regarding the signs came into proof to support theories of the defendants that were totally unrelated to an unpled defense of estoppel. Picking up on the treatise language quoted in ***Zack Cheek Builders, Inc***., the plaintiffs did not "knowingly acquiesce[] in the introduction of evidence relating to issues that are beyond the pleadings." ***Zack Cheek,*** 597 S.W.2d at 891. The "sign" evidence was consistent with the pleadings and consistent with the non-estoppel theories of defendants' counsel. The plaintiffs had no reason whatsoever to believe that this evidence was offered to prove estoppel. To argue otherwise is to ignore the defendants' clear position at trial – *they were not relying on the affirmative defense of estoppel.*

We find no abuse of discretion in the trial court's decision to deny the defendants' motion to amend the pleadings to conform to the evidence. We also agree with the trial court's observation that to allow the amendment would be to prejudice the plaintiffs whose counsel represented to the court that had the issue of estoppel been properly pled, he would have offered new evidence to rebut this theory.[6]

B. Motion for New Trial

The main focus of the plaintiffs' appeal is on the trial court's decision to grant the defendants' motion for a new trial. The court granted a new trial in order to allow the defendants to amend their answer to assert affirmative defenses, particularly estoppel, none of which, as previously noted, were raised in the original answer or tried with the implied consent of the parties.

Generally speaking, a motion for a new trial addresses itself to the sound discretion of the trial court. ***Esstman v. Boyd***, 605 S.W.2d 237, 240 (Tenn. Ct. App. 1979). An appellate court should not disturb a trial court's decision to grant or deny a new trial unless the trial court has abused its discretion. ***Id***. "A trial court abuses its discretion whenever it 'applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.'" ***Clinard v. Blackwood***, 46 S.W.3d 177, 182 (Tenn. 2001) quoting ***State v. Shirley***, 6 S.W.3d 243, 247 (Tenn. 1999).

[6]This he did, putting on proof that a "sold" sign had not been placed on the property. The trial court at the second trial apparently believed this evidence because it held that the affirmative defenses asserted by the defendant were not made out; hence, the trial court in the second go-around found that the defendants were liable to the plaintiffs.

It is clear that a finding of an abuse of discretion cannot be based simply upon an appellate court's determination that it would have decided the question differently. ***Whiton v. Whiton***, C/A No. E2000-00467-COA-R3-CV, 2002 Tenn. App. LEXIS 512, at *21 (Tenn. Ct. App. E.S., filed July 18, 2002). Rather, this standard requires that we determine "whether the lower court's exercise of its discretion went beyond the bounds of a fair exercise of discretion." ***Id***. *See also* ***State v. Gilliland***, 22 S.W.3d 266, 273 (Tenn. 2000) ("Although a decision made under this standard will not be lightly reversed on appeal, the discretion of the trial court is not without limits.").

The defense of estoppel, as well as other affirmative defenses, must be asserted in an appropriate pleading. Tenn. R. Civ. P. 8.03. It is clear that a "party waives all defenses and objections which the party does not present either by motion..., or,...in the party's answer or reply,..." Tenn. R. Civ. P. 12.08. *See* ***Rawlings v. John Hancock Mut. Life Ins. Co.***, 78 S.W.3d 291, 300 (Tenn. Ct. App. 2001) ("The failure to assert a claim or defense in a timely manner is deemed a waiver of the right to rely on the claim or defense later in the proceeding.").

Pleadings play an important role in litigation. As we said in the ***Rawlings*** case,

> [t]he pleadings required by the Tennessee Rules of Civil Procedure provide the vehicle for identifying and refining the matters at issue in a lawsuit. They provide the parties and the trial court with notice of the claims and defenses involved in the case.

Id.

In the instant case, the issues were framed by the parties' pleadings. It was the theory of the defendants that the "for sale" sign and the "sold" placard had effectively satisfied the requirements of notice set forth in the option agreement. It was further their theory that the option agreement and law placed an obligation on the plaintiffs to come forward and advise the defendants of their option rights – of which the defendants had constructive notice by virtue of the filing of same in the office of the Register of Deeds – in order to "mitigate" their damages. While neither of these theories are supported by the contract or any law to which we have been cited, these were the defendants' theories. As previously stated, the defense of estoppel was not pled and *was expressly disavowed as a defense by the defendants' counsel.*

The trial court tried this case on the issues framed by the parties. The trial consumed two days and is represented by five volumes of transcript. Each side had a full and fair airing of their respective positions. We find and hold that the trial court, in granting a new trial, "went beyond the bounds of a fair exercise of discretion." ***Whiton***, 2000 Tenn. App. LEXIS 512, at *21.

It is important in this case to recognize that the trial court did not have second thoughts regarding the propriety of its judgment, to the extent the judgment was a response to *the evidence and the issues established by the pleadings*. There is nothing in the record to suggest that the trial court decided that it had made the wrong decision. Rather, it is clear to us that the trial court simply

decided that the defendants should have a second "bite at the apple" – a new trial based upon new theories of defense. This judgment by the trial court runs contrary to a well-established principle set forth in the case of ***Chadwell v. Knox County***, 980 S.W.2d 378 (Tenn. Ct. App. 1998):

> ...we do not find any authority which authorizes a motion to alter or amend in order to allow a party to present [his or] her case under a new theory when the facts and law were available to be argued at the trial prior to the court's original decree.

Id. at 383, quoting ***Spencer v. Hurd Inv. Properties, Inc.***, 1991 Tenn. App. LEXIS 275 (Tenn. Ct. App. W.S., filed April 23, 1991).

C. Preponderance of Evidence

Much of the defendants' arguments pertaining to the facts of this case presupposes that the defenses which were added "to the mix" before the second trial – estoppel, laches, and waiver – were properly presented at the first trial. They were not. Based on the issues that were properly before the court at the first trial, we cannot say that the evidence preponderates against the trial court's findings underpinning its judgment as to liability or damages. Certainly, we cannot place the trial court in error with respect to the original judgment on the issues now raised in the brief that pertain to unpled matters.

VII. *Conclusion*

The judgment of the trial court awarding the plaintiffs damages of $381,000 is hereby vacated. The trial court's original judgment in favor of the plaintiffs in the amount of $851,000 is hereby reinstated. Costs on appeal are taxed to the defendants, Estate of Johnnie Rex Flynn and Barbara Flynn. This case is remanded for enforcement of the reinstated judgment and for collection of costs assessed below, all pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE