IN THE COURT OF APPEALS

CHARLES H. McCOLLUM and wife JOYCE McCOLLUM; KATHERINE McCALLIE; ERNEST L. BROWN and wife, INEZ BROWN; KATHLEEN H. LONG; and STELLA MYRTLE DUNSMORE, by her attorney-in-fact, WALTER J. DUNSMORE,	)	BLOUNT CIRCUIT
Plaintiffs-Appellees	)	C. A. NO. 03A01-9505-CV-000158
vs.	)	HON. W. DALE YOUNG JUDGE
CITY OF FRIENDSVILLE and CSX TRANSPORTATION, INC.,	)	VACATED IN PART, AFFIRMED IN PART AND REMANDED
Defendants-Appellants	)	

MICHAEL H. MEARES, Dungan & Meares, Maryville, for appellant.

DAVID T. BLACK, Kizer & Black, Maryville, for appellees.

OPINION

McMurray, J.

This action was originally instituted as a declaratory judgment action, seeking the court's determination as to ownership of a tract of land over which CSX and its predecessor in title formerly held a right-of-way for railroad tracks.[1] The plaintiffs further asked the court to declare whether the City of Friendsville (hereinafter referred to as City) had conducted activities on their property which resulted in a taking by inverse condemnation. The City of Friendsville, in due course, filed an answer to the complaint and a counterclaim. In its answer, the City denied that the plaintiffs were the owners of the property in question and admitted that it had conducted certain activities upon the property claimed by the plaintiffs. In the counterclaim, the City sought to condemn the subject property through the exercise of the power eminent domain should the court determine that the plaintiffs were, in fact, the owners of the property. The trial court resolved the issue of ownership against the appellant and awarded attorney's fees pursuant to T.C.A. § 29-16-123(b). The City appeals from the award of attorney's fees. We vacate that part of the judgment of the trial court awarding attorney's fees to the plaintiffs.

HISTORY OF THE CASE

[1] It is undisputed that CSX formally and properly abandoned the right-of-way.

This case has a long and tortured history. We will first set out in chronological order the pleadings, motions, orders, etc., which we have deemed to be material to the issues under consideration.

1. On July 7, 1989, the plaintiffs filed their complaint seeking a declaratory judgment that they were the owners of the property in question on the theory that the property reverted to them upon abandonment by the railroad or they had acquired the property by adverse possession. They further sought injunctive relief and a determination of whether there had been a taking pursuant to the "Inverse Condemnation Statute," T.C.A. § 29-16-123.

2. On February 28, 1990, the City of Friendsville filed a motion for summary judgment on the question of ownership.

3. On June 9, 1990, the City's motion for summary judgment was overruled.

4. On October 2, 1990, the City filed an answer and counterclaim. In the answer, the City denied that the plaintiffs owned the property in question. The City admitted that it had begun construction activities on the property with the intention of constructing a "Greenbelt Park" and recreation facility.

   The answer was later amended to state that:

   > The defendant admits that it cleaned, graded and seeded a portion of the property claimed by plaintiffs with the initial intention of developing a greenbelt park and recreation facilities as alleged in paragraph 5 of the complaint, but denies that construction of the proposed park was ever begun and denies the remaining allegations contained in paragraph 5 of the complaint.

In its counterclaim the City sought to directly condemn the property if the issues of ownership were resolved against it.

5. On October 3, 1990, the plaintiffs filed a motion to bifurcate the issue of ownership from the issues of inverse condemnation and direct condemnation.

6. On October 19, 1990, an order was entered, by agreement of the parties, bifurcating the issue of ownership from "[a]ll issues related to inverse condemnation, condemnation and damages."

7. On July 25, 1991 the City filed a motion for partial summary judgment on the issue of adverse possession by the plaintiffs.

8. On November 19, 1991, the plaintiffs filed a motion for summary judgment on the issue of ownership.

9. On November 19, 1991, an order was entered settling the controversy between the plaintiffs and CSX. (CSX was no longer a party to this action and is not a party to this appeal.

10. On February 4, 1992, an order of voluntary dismissal was entered as to the City's counterclaim.

11. On May 19, 1992, an order was entered granting the City's motion for partial summary judgment on the issue of adverse possession.

12. On May 19, 1992, an order was entered sustaining the plaintiffs' motion for summary judgment. The order sustaining the summary judgment provided as follows as it related to the issues before us on appeal:

> 1. ...
>
> 2. Because there is no genuine issue of material fact, the plaintiffs' Motion for Summary Judgment is sustained and title to the property underlying the abandoned CSX Railroad right-of-way is confirmed in the plaintiffs in accordance with the survey of Blount Surveys, Inc., dated the 24th day of March, 1992. ...

3. Plaintiffs are entitled to declaratory relief as follows:

> (a) The right-of-way of the Defendant, CSX Transportation, Inc., and its predecessor in title was abandoned in 1984 ... and that title ... is vested in the plaintiffs as adjoining property owners.
>
> (b) That the City of Friendsville has no interest in or claim to the abandoned railroad right-of-way ... .
>
> (c) That the City of Friendsville is enjoined from using Plaintiffs' property in a manner inconsistent with plaintiffs' rights and title therein unless and until the court determines that the property has been inversely condemned by the City of Friendsville or unless a condemnation proceeding is initiated by the City of Friendsville.

4. ... .

5. The issue of whether or not the City of Friendsville is obligated for the plaintiffs' attorney's fees is reserved pending a determination by the court as to whether or not the City of Friendsville has inversely condemned the property in question and the submission by plaintiffs' counsel of an itemized application for attorney fees.

13. On February 3, 1993, the plaintiffs filed a motion for attorney's fees under the provisions of T.C.A. § 29-16-123(b). (Inverse Condemnation Statute).

14. On February 10, 1993, the plaintiffs filed an amended motion for attorney's fees asking for additional fees pursuant to the provisions of T.C.A. § 29-17-812. (Abandonment of a condemnation action).

15. On January 10, 1995, the plaintiffs filed and served on the City a "Notice of Hearing." The notice provided that the "plaintiffs will call up for hearing <u>all remaining issues</u> including their motion for an award of attorney fees, engineering expenses, and costs related to the defendant's attempted 'taking' of plaintiffs property." An affidavit in

support of the motion for an award of attorney fees was filed as an attachment to the notice. (Emphasis added.

16. On February 16, 1995, the court entered a judgment the body of which is set out in toto as follows:

> This cause came on to be heard on this the 31st day of January, 1995, before the Honorable W. Dale Young, Judge of the Circuit Court for Blount County, Tennessee, upon the plaintiffs' notice of hearing and the plaintiffs' motions for an award of attorneys fees and costs. On the calling of the case, the court heard argument of counsel, reviewed the pleadings and the affidavit of plaintiffs' counsel and plaintiffs tender of proof thereon.
>
> The court then determined that the plaintiffs were entitled to recovery of their attorney fees, engineering expenses, and costs pursuant to the provisions of Tenn. Code Ann. § 29-17-123(b) and that the attorney fees and costs totaling $16,983.46 were reasonable and necessary.
>
> It is therefore, accordingly, ORDERED, ADJUDGED and DECREED by the court that the plaintiffs shall have and recover from the defendant, City of Friendsville, the sum of $16,983.46 for which execution may issue if necessary after thirty (30) days.
>
> The costs of this cause are taxed to the City of Friendsville ... .[2]

ISSUES

It is from this judgment that the City has appealed and presents the following issues for our review:

[2]Several other intervening motions, orders and other documents were filed but none are deemed to be material to the issues before this court.

1. Did the trial court err in awarding plaintiffs' costs, engineering and attorney's fees without a trial on the issue of inverse condemnation?

2. Did the trial court err in determining that an inverse condemnation had occurred when at the same time and on the same facts in Brickell, et al v. City of Friendsville, it determined that no inverse condemnation had occurred?

3. Did the trial court err in determining that an inverse condemnation had occurred while failing to assess damages and award defendant the condemned property.

DISCUSSION

Firstly, we will observe that, procedurally, this case is somewhat of a mystery to us. It appears to have become bogged down in a quagmire of pleadings, exhibits, motions, etc., to such an extent that the parties lost sight of the issues properly pending before the court.

At the hearing which gave rise to the final judgment, the court heard no evidence and none was offered except as to the amount and reasonableness of the plaintiffs' attorney's fees. There was no express adjudication on the issue of inverse condemnation, even though, in its order granting the plaintiffs' motion for summary judgment, the issue of whether the City of Friendsville is obligated for the plaintiffs' attorney's fees was specifically reserved pending a determination by the court as to whether or not

the City of Friendsville has inversely condemned the property in question.

There has been no finding that an inverse condemnation has occurred; or, what, if anything, was taken; the interest, if any, that was acquired by the defendant because of a taking, nor was there a finding of damages, if any, to which the plaintiffs were entitled. Since the plaintiffs' "Notice of Hearing" called up "all remaining issues" in the case for hearing on January 31, 1995, we will presume that the court determined that all issues not addressed in the final judgment were without merit. If the issues were properly before the court, it was the trial court's duty to decide the issues between the parties. "We are not at liberty to presume, even in the absence of an express ruling thereon, that the trial court overlooked a viable issue in the case. Conversely, a public official, in the absence of proof to the contrary, is presumed to do his duty. See State ex rel. Biggs v. Barclay, 216 S.W.2d 711 (Tenn. 1948). Therefore, we must presume that the trial judge correctly and adequately considered all issues properly presented and that, absent a showing to the contrary, the judgment is complete in every respect. A silent record is insufficient to demonstrate the contrary." Brookside Mills, Inc., v. The William Carter Company, et al., an unreported opinion of this court filed November 29, 1994.

At the January 31, 1995, hearing it was the position of the plaintiffs that there were no other and further issues that required proof other than that required for an award of attorney's fees and the plaintiffs failed to present further proof. In addressing the court, plaintiffs' attorney stated inter alia:

> It's true we're not here on summary judgment, Your Honor, but it's true we were here prepared to resolve this entire matter and I think it can be resolved really quite briefly just by reading what the City has done. If they've got anything that says they didn't do what they swore —didn't swear, what they responded in their answer that they did then their answer belies whatever testimony that may be because they outline facts that constitute an attempted taking of these plaintiffs' property and I don't think there's any dispute whatsoever about it but because that might possibly be an issue of fact we called that issue up for hearing today. (Emphasis added). ... Our proof simply would be on direct what they say in their answer, what their pleadings say that they did.

T.C.A. § 29-17-812, at the times material to this action, provided in pertinent part as follows:[3]

> **29-17-812. Costs of trial.** —(a)...
>
> (b) The State court having jurisdiction of a proceeding initiated by any person agency, or other entity to acquire real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for his reasonable costs, disbursements and expenses, including reasonable

[3]This section of the code was rewritten by an amendment enacted in 1994, effective May 9, 1994. The section set out above is quoted as of the date this action was initiated.

> attorney, appraisal and engineering fees, actually incurred (emphasis added) because of condemnation proceedings, if:
>
> (1) ...
>
> (2) The proceeding is abandoned by the acquiring party.

It is significant to note that the trial court made no award under T.C.A. § 29-17-812(b)(2) as set out above. In declining to do so, the court was eminently correct. The only evidence relating to expenses incurred because of the counterclaim was a single entry in the itemized exhibit to the plaintiffs' attorney's affidavit regarding attorney's fees. In his itemized exhibit, plaintiffs' attorney lists 0.66 hours expended for "letter to clients, review counter-complaint, order, motion, etc." Neither this court nor the trial court can determine from the evidence presented by way of affidavit what portion of the 0.66 hours was related to the "review of the counterclaim." Therefore, the plaintiffs failed to establish with the requisite certainty the expenses, if any, "actually incurred" as a result of the institution of condemnation proceedings by the City.

T.C.A. § 29-16-123 provides as follows:

> **29-16-123. Action initiated by owner.** — (a) If, however, such person or company has actually taken possession of such land, occupying it for the purposes of internal improvement, the owner of such land may

> petition for a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided; or he may sue for damages in the ordinary way, in which case the jury shall lay off the land by metes and bounds and assess the damages, as upon the trial of an appeal from the return of a jury of inquest.
>
> (b) Additionally, the court rendering a judgment for the plaintiff (emphasis added) in a proceeding brought under subsection (a) of this section, arising out of a cause of action identical to a cause of action that can be brought against the United States under 28 U.S.C. § 1346(a)(2) or § 1491, or the attorney general or chief legal officer of a political subdivision of the state effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement such sum as will in the opinion of the court, or the attorney general or chief legal officer of a political subdivision of the state reimburse such plaintiff for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

Clearly, T.C.A. § 29-16-123(b) requires as a condition precedent to an award of attorney's fees, that the plaintiff be successful in obtaining a judgment under the provisions of T.C.A. § 29-16-123(a). Here the condition precedent was not met. No judgment was rendered in favor of the plaintiff on the issue of inverse condemnation. Therefore, it was error for the trial court to make an award of attorney's fees under this section.

We wish to note that the Tennessee Rules of Evidence were adopted effective January 1, 1990, and were in full force and effect at the time this case was heard.

Rule 803 provides in pertinent part as follows:

Rule 803. Hearsay exceptions. —The following are not excluded by the hearsay rule:

(1.2) Admission by Party-Opponent. — A statement offered against a party that is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement in which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by an agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship under circumstances qualifying the statement as one against the declarant's interest regardless of declarant's availability, or (E) a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy, or (F) a statement by a person in privity of estate with the party. An admission is not excluded merely because the statement is in the form of an of an opinion. Statements admissible under this exception are not conclusive.

The Advisory Commission Comments to this section state:

* * * *

The final sentence is intended to abolish the distinction between evidentiary and judicial admissions. Unless made conclusive by statute or another court rule, such as T.R.C.P. 36.02 on requests for admission, all party admissions are simply evidentiary, not binding, and are subject to being explained away by contradicting proof.[4]

[4]Prior to the adoption of the Tennessee Rules of Evidence "[a]dmissions in pleadings are judicial (conclusive) admissions, conclusive against the pleader until withdrawn or amended. McCormick on Evidence, 2nd edition, § 265, p. 633; 31 C.J.S. Evidence § 301, p. 772, note 23." John P. Saad and Sons v. Nashville Thermal, 642 S.W.2d 151 (Tenn. App. 1982). This rule no longer prevails.

While the Advisory Commission Comments are not binding, they are compellingly persuasive.[5] A party cannot simply rely on pleadings as a substitute for an evidentiary hearing.[6] Further, the party bearing the burden of proof may not meet the burden by simply stating to the court what the proof, if presented, would be. The appropriate procedure to obtain a judgment on the pleadings is a motion pursuant to Rule 12, Tennessee Rules of Civil Procedure. No "Rule 12 motion" was made. At the final hearing the plaintiffs insisted that further evidence on the issue of taking by the City was not necessary and none was presented. Therefore, a finding that there had been a taking by the City would have been inappropriate. As hereinbefore noted, we presume the trial judge did his duty and resolved the issue of taking against the plaintiffs.

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[5]A judicial admission must be distinguished from judicial estoppel. In Sartain v. Dixie Coal and Iron Co. 150 Tenn. 633, 266 S.W. 313 (1924) the supreme court said, at 653:

> The distinctive feature of the Tennessee law of judicial estoppel (or estoppel by oath) is the expressed purpose of the court, on broad grounds of public policy, to uphold the sanctity of an oath. The sworn statement is not merely evidence against the litigant, but (unless explained) precludes him from denying its truth. It is not merely an admission, but an absolute bar.

[6]In any event, if the facts stated in the pleadings are taken as true, it would be just as reasonable to conclude that the actions of the city constituted a simple trespass as a temporary taking.

CONCLUSION

We vacate the judgment of the trial court awarding attorney's fees and expenses to the plaintiffs. In all other respects, the judgment of the trial court is affirmed.

The appellant has filed a motion asking this court to consider post-judgment facts. In the light of our disposition of the case, appellant's motion is moot.

Costs of this appeal are taxed to the appellees and this cause is remanded to the trial court for the collection thereof.

_____
Don T. McMurray, J.

CONCUR:

_____
Charles D. Susano, Jr., J.

_____
William H. Inman, Senior Judge

IN THE COURT OF APPEALS

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CITY OF FRIENDSVILLE and CSX TRANSPORTATION, INC.,	)	VACATED IN PART, AFFIRMED IN PART AND REMANDED
Defendants-Appellants	)	

ORDER

This appeal came on to be heard upon the record from the Circuit Court of Blount County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that that the judgment should be vacated in part and affirmed in part.

We vacate the judgment of the trial court awarding attorney's fees and expenses to the plaintiffs. In all other respects, the judgment of the trial court is affirmed.

Costs of this appeal are taxed to the appellees and this cause is remanded to the trial court for the collection thereof.

PER CURIAM