

IN THE COURT OF APPEALS

**FILED**  
**February 29, 1996**  
**Cecil Crowson, Jr.**  
Appellate Court Clerk

JAMES E. LINKOUS, and wife, )  
PATRICIA FERGUSON LINKOUS, )  
Plaintiffs - Appellants )

HAMILTON CHANCERY  
C. A. NO. 03A01-9510-CH-00341

vs. )

HON. R. VANN OWENS  
CHANCELLOR

DOUGLAS E. BURKHART and )  
WILLIAM A. BURKHART, )  
Defendants - Appellees )

AFFIRMED AND REMANDED

PHILLIP C. LAWRENCE, Poole, Lawrence, Thornbury, Stanley & Morgan,  
Chattanooga, for Appellants.

L. HALE HAMILTON, Spears, More, Rebman & Williams, Chattanooga,  
for Appellees.

O P I N I O N

Murray, J.

This is a boundary line dispute. After a lengthy bench trial the Chancellor established a common boundary between the lands of the parties and entered judgment accordingly. From this judgment this appeal resulted. We affirm the judgment of the trial court.

The parties are the owners of adjoining tracts of land located in Chattanooga. The appellants acquired their property by warranty deed from Flora P. McKenna.

The description recited in the appellants' deed is as follows:

BEGINNING at a point in the Northern line of the property conveyed to Flora P. McKenna and husband, E. R. McKenna, ... where the same is intersected by the Western line of State Highway #153; thence North eighty-six (86) degrees thirty (30) minutes West, Two hundred forty-seven feet, more or less to the Northwest Corner of the tract conveyed to E. R. McKenna and wife, Flora P. McKenna, by deed recorded in Book 1135, page 517, ... thence South one (01) degree twenty-three minutes West along the Western line of said tract, two hundred forty-seven (247) feet, more or less, to a point in the Western line of said highway, two hundred and 38/100 (200.38) feet to the point of beginning.

\* \* \* \*

SUBJECT to the Western part of said property to be used in the extension of Gothard Road as set out in deed recorded in Book 1135, page 517, in the Register's Office of Hamilton County, Tennessee.

The deed to appellants' predecessor in title, Frank E. Peebles contains the following recitation.

It is the intention of the grantor and grantees that the line designated as South 1° 23', a distance of 200.38 feet, is to be the center of Gothard Road, when extended, and this deed includes a strip of land approximately ten feet wide along the said West portion of the tract of land herein conveyed, which is to be dedicated for road purposes.

The description recited in the appellees' deed is as follows:

To locate the point of beginning, begin at a point in the Western line of Highway 153 at the Southeastern corner of the property conveyed to Edwin V. Vandergriff; thence North 86 degrees 30 minutes West along the Southern line of the Vandergriff property 284.94 feet to a concrete monument in the center line of Gothard Road, this being the true point of point of beginning; thence South 01 degree 23 minutes West 200.38 feet; thence North 86 degrees 30 minutes West 127 feet to the center line of a 12 foot drive; thence north 01 degrees 09 minutes 04 seconds West 37.77 feet; thence with the center line of the drive and a curve to the right 101.56 feet to a point; thence North 53 degrees 24 minutes 37 seconds East 112.37 feet to the point of beginning.

As can be seen from a literal reading of the descriptions in the respective deeds, a concrete marker in the center line of Gothard Road was to be the common corner of the parties. The court so found and ordered the Linkous deed reformed to conform to the point in the center line of Gothard Road with the Western Line of the Linkous property being a common boundary with Burkhart. It is this judgment which gave rise to this appeal.

The appellant has presented the following issue for our consideration:

Did the trial court err in finding that the northeast corner of the appellants' tract of land is located a distance of 269.94 feet from a concrete monument, which itself is 95 feet west from the center line of Highway 153, when the preponderance of the evidence showed that the corner is actually 274.1 feet from this concrete monument?

The appellee has stated three issues for our consideration, however, the issues are essentially and in substance the same as the appellants', i.e., does the evidence preponderate against the findings of the trial court.

In our view, the issues between these parties can be more succinctly and simply stated, i.e., does the evidence preponderate against the findings of the trial court in establishing the common boundary between these parties. All other points are irrelevant except as they may relate to the establishment of the parties' common boundary.

Our standard of review under Rule 13(d), T.R.A.P., is "[u]nless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the

correctness of the finding, unless the preponderance of the evidence is otherwise." A principle of law concomitant with Rule 13(d) is that where the evidence is conflicting, findings of the trial court which are dependent on determining the credibility of witnesses are entitled to great weight on appeal because the trial judge had the opportunity to observe the manner and demeanor of the witnesses while testifying. Galbreath v. Harris, 811 S.W2d 88 (Tenn. App. 1990) citing Town of Alamo v. Forcum-James Co., 327 S.W2d 47 (Tenn. 1959). . . . on an issue which hinges on witness credibility, the trial court will not be reversed unless there is found in the record clear, concrete, and convincing evidence other than the oral testimony of witnesses which contradict the trial court's findings. See Tennessee Valley Kaolin Corp. v. Perry, 526 S.W2d 488 (Tenn. App. 1974).

The evidence was extensive and conflicting. There is evidence oral and otherwise which supports and contradicts the findings of the trial court. None of the demonstrative evidence, however, meets the "clear, concrete, and convincing" test. The probative value of the maps, plats and photographs introduced into evidence depend to a very large extent upon the oral testimony and credibility of the witnesses authenticating them

In determining disputed boundaries, resort is to be had first to natural objects or landmarks, because of their very permanent character; next, to artificial monuments or marks, then to the boundary lines of adjacent landowners, and then to courses and distances. Thornburg v. Chase, 606 S.W 2d 672, 675 (Tenn. App. 1980) (citing Pritchard v. Rebori, 135 Tenn. 328, 332-33, 186 S.W 121, 122 (1916)). This rule of construction is to aid in determining the intention of the parties to a deed which is to be determined, if possible, from the instrument in connection with the surrounding circumstances. *Id.* The Court of Appeals in Thornburg also noted that the policy behind giving preference to artificial lines is "that the parties so presumed to have examined the property have, in viewing the premises, taken note of the monument or line." *Id.* at 676 (quoting Pritchard, 135 Tenn. at 335, 186 S.W at 123). See Mirkum v. Kelly, an unreported opinion of this court filed January 26, 1995.

From the four corners of the deeds which are germane to the issues before us, it seems crystal clear that the intentions of the parties to the deeds were to establish the northwest corner of the appellants' property and the northeast corner of the appellees' property at the center line of Gothard Road. This conclusion is inescapable when the deeds are looked at in *pari materia*. Further

we note that the distances in the appellants' deed are not as precise as those stated in the appellees' deed. All distances in the appellants' deed are qualified as being "more or less."

The appellants rely upon the testimony of Alfred Allen, a licensed land surveyor to establish that Gothard Road could not be precisely established. It is true that Mr. Allen testified that "... everywhere I found it [Gothard Road], every plat I found it on it was in a different place. It was just a narrow winding driveway more than anything, and you could put a line on it any place almost, but that had no bearing on what we was doing so we didn't try to establish Gothard Road. We wasn't working on that at the time."

It is clear from his own testimony that Mr. Allen made no attempt to locate the center of Gothard Road as mentioned in the parties' deeds. The location of Gothard Road is the heart of this action. On the other hand, Mr. David Matthews, also a licensed land surveyor, testified that he found an iron pin in the center line of Gothard Road which he marked.<sup>1</sup>

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<sup>1</sup>Mr. Matthews name is spelled as "Mathews" and "Matthews" in the record. We do not know which is correct but we shall use "Matthews" since it seems to be the most common spelling.

In reaching his conclusions, Mr. Matthews testified that he looked to the deeds of all the predecessors in title for all the properties around Mr. Linkous' property, state highway plans and other surveys that might be available. He further testified that he used markers that were found on the ground, physical markers, in order to do his survey. He found various iron pins on the Linkous property, including an iron pin on Linkous' northwest corner and an old iron pin in his southwest corner. He further found the concrete markers marking the right-of-way of Highway 153. Further, using a deed of a predecessor in title, Mr. Matthews was able to locate the predecessor's point of beginning. From this point of beginning in the predecessor's deed and using the call and distance called for therein, he was able to locate an iron pin in the center line of the Gothard Road. In reviewing the work of Mr. Matthews, it seems evident that he more nearly followed the rules for locations of boundaries set out in Thornburg v. Chase, supra, than the other witnesses who testified in the case.

We also note that the trial court in his decision announced from the bench appeared to accredit the testimony of Mr. Matthews. The court stated: "The court felt that Mr. Matthews was trying to be conscientious about his survey and he did go into more depth in some of these things than Mr. Allen . . . ."



The trial court was ostensibly satisfied that the center of Gothard Road was sufficiently established. The Court specifically found in the final judgment that "... the western boundary line of the plaintiffs' [appellants'] property is the center of Gothard Road ... ." We find that the evidence preponderates in favor of the trial court's judgment and we concur with the findings of the trial court.

The trial court is affirmed in all respects. Costs of this appeal are taxed to the appellant and this case is remanded to the trial court for the enforcement of its judgment and collection of costs.

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Don T. Murray, J.

CONCUR:

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Houston M. Goddard, Presiding Judge

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Charles D. Susano, J.

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DOUGLAS E. BURKHART and	)	AFFIRMED AND REMANDED
WILLIAM A. BURKHART,	)	
	)	
Defendants - Appellees	)	

ORDER

This appeal came on to be heard upon the record from the Chancery Court of Hamilton County, briefs and argument of counsel. Upon consideration thereof, this Court is of opinion that there was no reversible error in the trial court.

The trial court is affirmed in all respects. Costs of this appeal are taxed to the appellant and this case is remanded to the trial court for the enforcement of its judgment and collection of costs.

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