IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

ARCHIE BROOKS and wife,
PATSY BROOKS,

Plaintiffs-Appellees,

Vs.

Houston Chancery No. 4-90
C.A. No. 01A01-9508-CH-00365

BOBBY BRAKE and wife,
JUNE BRAKE,

Defendants-Appellants.

FROM THE CHANCERY COURT OF HOUSTON COUNTY

THE HONORABLE ALLEN W. WALLACE, CHANCELLOR

Laurence M. McMillan, Jr., Cunningham, Mitchell, Hicks,
Brollier & McMillan of Clarksville
For Defendants-Appellants

David D. Wolfe of Dickson
For Plaintiffs-Appellees

VACATED IN PART, AFFIRMED IN PART AND REMANDED

Opinion filed:

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

DAVID R. FARMER, JUDGE

HOLLY KIRBY LILLARD, JUDGE

This appeal involves a boundary line dispute. Plaintiffs, Archie Brooks, and wife, Patsy Brooks, and defendants, Bobby Brake, and wife, June Brake, are adjacent landowners. Plaintiffs' complaint alleges that defendants are trespassing on their property and disputes the true boundary line established by survey. The complaint avers that plaintiffs had an agreement with Edward Coleman, a timber cutter, to harvest timber on plaintiffs' property. Defendants, through their attorney, notified Coleman in writing that the property belonged to the defendants and threatened Coleman with a lawsuit if he attempted to perform the timber cutting contract. The complaint further avers that defendants have interfered with the peaceful use and enjoyment of their property causing plaintiffs damages and requiring that they file this lawsuit to obtain judicial relief. Plaintiffs seek the establishment of the boundary line between the parties, injunction against defendants from trespassing on their property, and an award of damages for the loss of the timber contract, costs and attorney fees incurred in protecting the title to their property.

Defendants' answer joins issue on the material allegations of the complaint and denies that they have trespassed on plaintiffs' property. Defendants filed a counter-complaint against plaintiffs alleging that the boundary line has been an agreed boundary line for many years, and that the defendants had no knowledge of any dispute concerning the boundary line until shortly after the plaintiffs acquired title to their property. Defendants contend that they have been in open, notorious and adverse possession of the property under recorded assurance of title for more than forty years. Defendants also seek establishment of the boundary line, an injunction enjoining the plaintiffs from trespassing upon the property, and damages.

After a nonjury trial, the trial court found that the true boundary line between the parties was that claimed by the plaintiffs, but denied plaintiffs' claim for damages finding that defendants acted in good faith in contesting the boundary. Plaintiffs filed a motion for new trial as to damages only, and upon reconsideration, the trial court found that defendants did not act in good faith and awarded plaintiffs attorney fees, one half of the Hansard survey cost, and the witnesses' expense incurred by plaintiffs.

The disputed boundary line runs north and south. The Brookses' property is on the east

side and the Brake's property is on the west side. June Brake, *nee* June Brooks, is Archie Brooks's first cousin. Although the parties agree upon the northern-most point of the disputed boundary line, the parties do not agree upon the location of the southern-most point of the boundary. According to plaintiffs, the common boundary line at the southern portion of the parties' property is located approximately 182 feet west of the point claimed by the defendants. As a result of the parties' disagreement, the ownership of a 7 acre area of hilly, wooded land is in dispute.

In 1976 the Brakes, who were then living in Michigan, purchased 32 acres of land from June Brake's mother, Ethel Brooks. Because the Brakes agreed to purchase the land by the acre, Ethel Brooks arranged for Garner Smith to survey the property to determine acreage and boundaries. It is undisputed that the Brakes did not obtain a copy of the Smith survey prior to purchasing the 32 acres. Mr. Brake testified that before he purchased the property, he believed that the fence constituted the boundary line; however, he later testified that he had no proof of the line's location.

When the Brakes moved from Michigan to Tennessee in 1978, Mr. Brake noticed that markers from the Smith survey placed his property line west of where he thought it was. At this time, Mr. Brake obtained a copy of the tax map, a copy of his deed, and a copy of the Smith survey. With these documents in hand, Mr. and Mrs. Brake went to visit Purlene Brooks, Mrs. Brake's great-aunt and plaintiff Archie Brooks's mother. Based on his conversation with Purlene Brooks, Mr. Brake took no further action, apparently assuming that the Smith survey was incorrect and that the property line was, as the Brakes believed, along the fence. Although the record does not reveal the contents of the Brake's conversation with her, Purlene Brooks testified at trial that she did not know where the property line was located; in fact, according to her, "nobody really knew."

In 1991, Archie Brooks took sole ownership of the property adjoining the Brakes' land, formerly owned by his parents, John and Purlene Brooks. Archie Brooks contacted Bobby Brake at that time to arrange for a surveyor to determine the exact location of the property line. As a result of this conversation, Mike Pendergrass ran a line and found that the common boundary

was not the fence, as the Brakes believed; rather, the line was west of the fence, as determined by the earlier Smith survey.

In June of 1993, the Brakes sent Edward Coleman, the timber cutter hired by the Brookses, a letter threatening prosecution if he cut timber on what the Brakes believed to be their property. The Brookses filed the present suit to determine the exact location of the boundary line between their land and the Brake's property.

After the Brookses filed suit, they hired David Hansard, a licensed surveyor with twenty years experience, to survey their property. The Hansard survey established that the boundary line was in the same location as shown by the tax map, the Smith survey, and the line run by Pendergrass.

At trial, the defendants and witnesses testifying on their behalf maintained that the property line ran with an old fence that was sixty (60) to eighty (80) feet west of the present fence, built in 1969 by Archie Brooks. This testimony conflicted with June Brake's testimony that a large set stone, not located along the alleged boundary line fence, marked the property line. June Brake and her brothers Harold and Jerry Brooks also testified that their father sold timber cut from the disputed area, and that he ran cattle and farmed on the area.

The trial court found that the legal boundary line was the line established by the Hansard survey. The court further found that the defendants failed to prove that the common boundary was changed either by agreement or by adverse possession. The court denied plaintiffs' claim for damages, however, finding that the defendants "relied in good faith on information given to them in contesting the boundary . . . ." Plaintiffs thereafter filed a motion for new trial as to damages only. The court, upon reconsideration, found that the defendants had prior knowledge of, and ignored, the boundary line established first by the Smith survey and later by the Hansard survey, and awarded plaintiffs damages in the amount of $4,393.50.

Defendants present two issues on appeal, the first of which, as stated in defendants' brief, is as follows:

> Whether the Chancellor erred in assessing the Plaintiffs' litigation expenses, including attorneys' fees, against the Defendants as "damages."

Although 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 exception to the general rule exists in cases involving libel of title. ***Ezell v. Graves***, 807 S.W.2d 700, 703 (Tenn. App. 1990). 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 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.

Slander of title was first recognized as a cause of action in ***Smith v. Gernt***, 2 Tenn. Civ. App. 65, 79-80 (1911). ***Harmon v. Shell***, No. 01-A-01-9211-CH-00451, 1994 WL 148663 (Tenn. App. M.S. Apr. 27, 1994) To establish a successful claim for slander of title, a plaintiff must prove:

> (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 (citations omitted).

Id. at *4. Statements made with reckless disregard of the property owner's rights or with reckless disregard as to whether the statements are false may be malicious within the scope of a libel of title action. ***Id***. (citing ***Gernt***, 2 Tenn. Civ. App. at 79-80; ***Hossler v. Hammel***, 587 N.E.2d 133, 134 (Ind. Ct. App. 1992)). To assert this cause of action, the 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***, 176 Tenn. 666, 669, 145 S.W.2d 766, 767 (1940). However, a good faith, but erroneous, claim of title does not constitute a cause of action for libel of title. ***Ezell***, 807 S.W.2d at 704.

The trial court found that after plaintiffs had a new survey done and the lines marked, the

defendants, or someone acting on their behalf, removed the marker. The court specifically found that defendants should have had notice that they did not own the land in question, that they ignored credible and compelling evidence that plaintiffs owned the land, and that they intended to hold possession of the property adversely. The court further found from the proof that the boundary line had always been where it was found to be by the court.

Considering the entire body of proof, we cannot say that the evidence preponderates against the trial court's implied finding that the defendants acted with reckless disregard of the Brookses' rights as property owners. They sent a letter to Mr. Coleman on June 15, 1993, threatening him with a lawsuit should he cut timber, pursuant to the Brookses' request, on what the Brakes believed to be their property. When they sent the letter, the Brakes were in possession of the Smith survey, commissioned by their seller more than fifteen years before and relied upon by the Brakes to establish the purchase price of their property. The Smith survey did not show the old fence as the boundary line, as claimed by the Brakes; rather, it established a boundary line close to the line later established by the Hansard survey, 182 feet west of the point claimed by the defendants. Additionally, the Brakes had a copy of the tax map and of their deed, both of which established a common boundary line close to the line found by the Smith survey. Based on these facts, the Brake's actions could constitute malice sufficient to establish a libel of title claim.

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*, attorney's fees, costs of depositions, and court reporter fees. ***Id***. However, from our review of the record, we are unable to reconcile the evidence with the trial court's findings regarding the amount of damages which should be awarded. Accordingly, we will remand this case to the trial court for calculation of plaintiffs' damages, consistent with this opinion.

Defendants' second issue on appeal, as stated in defendants' brief, is as follows:

> The trial court erred in not establishing the disputed boundary line consistent with the old fence line used by the parties' predecessors in interest.

Since this case was tried by the court sitting without a jury, we review the case *de novo*

upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. T.R.A.P. 13(d).

Any conflict of testimony requiring a determination of the credibility of witnesses rests in the first instance with the trial court and will be given great weight on appeal by the appellate court, unless other real evidence compels a contrary conclusion. ***State ex rel. Balsinger v. Town of Madisonville***, 222 Tenn. 272, 282, 435 S.W.2d 803, 807 (1968); ***Franks v. Burks***, 688 S.W.2d 435, 437-38 (Tenn. App. 1984).

In support of their allegation that the parties' common boundary line was an old fence, rather than the line established by the Hansard survey, the defendants contend that the parties' predecessors in interest acquiesced in the boundary line as established by the fence. It is well established that a disputed boundary line may be permanently established by oral agreement between adjoining landowners, and such agreement is not prohibited by the Statute of Frauds. ***Thornburg v. Chase***, 606 S.W.2d 672, 674 (Tenn. App. 1980). To establish the existence of a boundary line by agreement, the party making the assertion must prove

> [T]he boundary line fixed by the [oral] agreement . . . [is] definite, certain, and clearly marked, and that it . . . [is] made by the adjoining landowners with reference to an uncertain or disputed boundary line between their lands. Such an oral agreement, when executed and actual possession taken under it, becomes conclusive against the owners and those claiming under them. 12 Am. Jur. 2d *Boundaries* § 78 (1964). In order to enforce an oral agreement to establish the location of a boundary line, the parties must show: 1) a dispute or uncertainty as to the true location of the boundary line; 2) the agreement of the parties or their predecessors in interest as to the location of the boundary; 3) that the boundary line established by the oral agreement is definite and certain; and 4) possession and use of the property up to the agreed boundary by the parties or their predecessors in interest, or acquiescence in the boundary line.

Inman v. Nutt, No. 01-A-01-9209-CH-00352, 1993 WL 46519 (Tenn. App. M.S. Feb. 24, 1993) at *2.

William Edward Bailey, Archie Brooks's uncle, farmed the tract in question with Archie's father and predecessor in interest, John Brooks. Mr. Bailey testified that he and John Brooks built fences in the disputed area, but that the fences were built to keep in horses and

cows, not for the purpose of a boundary line. Mr. Bailey testified that it did not make any difference to John Brooks where the boundary line was. Purlene Brooks, Archie Brooks's mother, testified that her husband never told her where the boundary line was located; according to her testimony, nobody really knew where the line was. There is no evidence in the record that the parties, or their predecessors in interest, ever discussed a disputed or uncertain boundary line, or that they later fixed a new boundary line by oral agreement. Based on the foregoing, we conclude that the evidence does not preponderate against the findings of the trial court. T.R.A.P. 13(d).

The order of the trial court awarding damages and expenses is vacated and in all other respects is affirmed. The case is remanded to the trial court for further proceedings consistent with this Opinion to determine an award of damages and expenses to plaintiffs. Costs of appeal are assessed against appellants.

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

DAVID R. FARMER, JUDGE

HOLLY KIRBY LILLARD, JUDGE