IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 26, 2015 Session

CARLTON C. HOLDER v. VICTOR P. SERODINO, III, ET AL.

Appeal from the Chancery Court for Sequatchie County
No. 2308 Jeffrey F. Stewart, Chancellor

No. M2014-00533-COA-R3-CV- Filed September 16, 2015

This appeal arises from a dispute over an easement for a private airstrip. The original owner of the land sub-divided it into six tracts, with the plan of selling them to buyers interested in purchasing property with access to the airstrip. Three of the tracts were sold to Appellant and one was purchased by Appellee. After unsuccessful efforts to sell portions of their land holdings, the original owner and Appellant executed and recorded a purported abandonment of the easement. Upon discovering that the purchasers of the final two tracts sold by the original owner were building fences across the airstrip, Appellee brought suit seeking to assert his easement rights, among other claims. The trial court found that an express and, in the alternative, implied easement for the airstrip had been created. However, because the purchasers of the two tracts had been informed that the easement was abandoned, the court terminated the easement where it crossed those two tracts. In addition, the trial court found that the original owner and Appellant had committed the tort of libel of title in executing and recording an abandonment of easement without joining Appellee as a party to the agreement. We affirm in part, reverse in part, and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, Reversed in Part, and Remanded

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and RICHARD H. DINKINS, J., joined.

Tad K. Wintermeyer, Chattanooga, Tennessee, for the appellant, Victor P. Serodino, III.

Daniel M. Stefaniuk and William J. Rieder, Chattanooga, Tennessee, for the appellee, Carlton C Holder.

OPINION

I. BACKGROUND

A. FACTUAL HISTORY

Richard D. Pincelli purchased land located in Sequatchie County, Tennessee, from Emma P. Casey through two separate transactions on April 12, 1994, and January 6, 1995. Each of the two warranty deeds were subject to an identical restrictive covenant stating that, for a period of twenty-five years, "[n]o buildings shall be erected and maintained other than one single family dwelling on each tract and buildings normally appurtenant thereto including barns for horses and similar structures." The land conveyed was also subject to various utility easements.

Mr. Pincelli eventually subdivided a portion of his land into six ten-acre tracts ("tracts I–VI"),[1] with the plan of building what came to be known as the "Doe Run Airstrip" (the "Airstrip") across the six tracts and then selling them to purchasers interested in an airpark community. Mr. Pincelli completed construction of the Airstrip in 1995, when he still owned all of the land comprising the Airstrip. Mr. Pincelli initially used the Airstrip for his motorized hang glider.

In the fall of 1995, Mr. Pincelli approached Appellant, Victor P. Serodino, for a loan of $9,500 to maintain and extend the Airstrip. In return, Mr. Pincelli granted Mr. Serodino the right to use the Airstrip and the right of first refusal for future sales of the tracts. Both Mr. Pincelli and Mr. Serodino made use of the Airstrip to land their private aircraft. Mr. Serodino testified that, from the time he began using the Airstrip in 1995 until 2010, he took off and landed on the Airstrip "a thousand times, plus or minus."

On April 17, 2001, Mr. Pincelli conveyed tracts I–III to Mr. Serodino by general warranty deed. The deed provided that "[t]he above described property is subject to a right of way for an airstrip 3000' x 200', presently known as 'Doe Run Airstrip', as set forth in an Agreement dated 04/17/01." The referenced agreement, which was prepared by Mr. Serodino and signed by both Mr. Pincelli and Mr. Serodino prior to execution of the deed, provided further details concerning the Airstrip easement. Among other things, the agreement specified who might use the Airstrip, the location of the easement, and the effect of future transfers of property subject to the easement as follows:

> [W]e as Property Owners in Sequatchie County, Tennessee over which a 3,000' x 200' airstrip is constructed, presently known as "Doe Run Airstrip" along Barker Camp Road on Lewis Chapel Mountain, hereby agree to maintain the "Airstrip" at its present or future improved condition

[1] See Appendix with plat illustrating the layout of the tracts.

> for the operation of aircraft indefinitely. Property we own as individuals on/under the "airstrip" will be subject to group use, primarily the operation of aircraft, but also other activities subject to unanimous approval.
>
> The "airstrip" shall be the 3,000' x 200' area most commonly used for aircraft operation.
>
> Transfer or assignment of any property effected [sic] by this agreement shall include reference to this agreement in the Deed.
>
> This agreement may be modified from time to time as seen fit by the property owners but only by unanimous vote of all property owners forming a part of this agreement and currently owning land on the airstrip or land with access to the airstrip by aircraft.
>
> Each property owner shall have the full right and use of the entire airstrip without restriction by others or remuneration to others.
>
> . . . .
>
> This Agreement shall be binding upon, and inure to the benefit of, each of the parties and their respective heirs, successors and Assigns.

Although the deed transferring tracts I–III was recorded, the agreement between Mr. Pincelli and Mr. Serodino was not.

On July 20, 2001, Mr. Pincelli conveyed tract IV to Carlton C. Holder, the appellee, by general warranty deed. The deed to Mr. Holder stated that it was "subject to an agreement dated April, 2001, regarding the airstrip located on the above described property." Immediately prior to transferring the property, Mr. Pincelli made Mr. Holder sign an agreement regarding the Airstrip, which was nearly identical to the Pincelli-Serodino agreement.[2]

Approximately six years later, Mr. Pincelli conveyed tract V—the lot immediately east of Mr. Holder's—by general warranty deed to Neal B. Parker on July 10, 2007. Despite his earlier agreement with Mr. Serodino, the deed lacked a reference to a right of way for the Airstrip or Mr. Pincelli's prior agreements with Mr. Holder and

[2] The primary difference between the two documents is that the Pincelli-Serodino agreement includes the following integration clause: "[t]his Agreement supersedes all prior agreements, written and oral, between the parties with respect to the subject matter of this Agreement." The Pincelli-Holder agreement contains no integration clause. The Pincelli-Serodino agreement also has six signature lines (presumably one for each potential owner of the six tracts of land); the Pincelli-Holder agreement only contains signature lines for Mr. Pincelli and Mr. Holder.

Mr. Serodino. However, the deed did provide that the transfer was "subject to any and all existing easements."

Mr. Parker testified that the Airstrip appeared long disused when he first inspected the property; the grass on the Airstrip was at knee height. Upon inquiry, Mr. Pincelli responded that the property had been used as an airstrip but that it had been abandoned. Mr. Parker stated that he never would have purchased the property if he knew that it contained an easement for an airstrip.

On July 1, 2008, Mr. Pincelli conveyed the final tract subject to the Airstrip easement, tract VI, to Jerry S. Sloan and Glenna Ramer by general warranty deed. Once again, the deed made no mention of the Airstrip or the agreements Mr. Pincelli executed with Mr. Holder and Mr. Serodino. Like the deed to Mr. Parker, the deed provided that tract VI was "subject to any and all existing easements."

Mr. Sloan and Ms. Ramer subsequently transferred tract VI to Bruce A. and Kathleen Cunningham. The Cunninghams then transferred the property by warranty deed on September 18, 2009, to Larry D. Baggett and his wife, Bethel S. Baggett. Although containing the language that tract VI was "subject to any and all existing easements," the deed made no reference to the Airstrip or the agreements relating to it.

The Baggetts had previously purchased a different tract of land from Mr. Pincelli directly. When making this purchase, Mr. Baggett noticed an old windsock and hangar foundation on tract VI. He asked Mr. Pincelli whether there was an airstrip on the tract, and Mr. Pincelli told him that it had been abandoned.

Following his purchase of tract IV in 2001, Mr. Holder traveled extensively for work. As a result, he spent very little time at the property. He only landed on the Airstrip once, sometime in May 2001, before purchasing tract IV. Nonetheless, Mr. Holder testified that he intended to retire to the property, and the primary reason he had purchased it was to make use of the property and the Airstrip during his retirement.

In September 2010, on a visit to his property, Mr. Holder noticed that Mr. Parker and the Baggetts were in the process of erecting fences across the Airstrip where it intersected with their respective properties. At this stage, some of the fence posts were connected by string.

In researching his easement rights, Mr. Holder discovered a document entitled "Abandonment of Easement and Rights for Doe Run Airstrip," which had been executed and recorded by Mr. Pincelli and Mr. Serodino on July 8, 2010. The document purported to abandon the easement for the Airstrip, providing, in pertinent part, as follows:

> [W]e, Richard D. Pincelli and Victor P. Serodino, III, the sole parties to that certain right of way for an airstrip 3000' x 200' presently known as "Doe Run Airstrip" as set forth in Agreement dated 04/17/01 and recited in Deed from Richard D. Pincelli to Victor P. Serodino, III, dated April 17, 2001 . . . do hereby forever release, abandon and terminate all easements, rights, and benefits in and to the Doe Run Airstrip . . . .

Mr. Serodino later testified that he entered into the abandonment with Mr. Pincelli in order to entice Jerry S. Sloan to purchase tracts I and II.

Mr. Serodino conveyed tracts I and II to Mr. Sloan on July 9, 2010—the day after the abandonment was executed. In preparing the property for sale, Mr. Serodino's real estate agent, John Mitchum, approached Mr. Holder to inquire about any interest he may have in the Airstrip easement. Mr. Holder advised Mr. Mitchum of his interest in the Airstrip, although he failed to produce a copy of the July 20, 2001 agreement. Mr. Mitchum reported this fact to Mr. Serodino, but Mr. Serodino nonetheless signed and recorded the abandonment.

B. PROCEDURAL HISTORY

Mr. Holder filed a complaint[3] against Mr. Pincelli, Mr. Serodino, Mr. Parker, and the Baggetts in the Chancery Court of Sequatchie County, Tennessee. Mr. Holder sought: (1) a declaratory judgment that the 2001 easement was enforceable as an express easement and injunctive relief; (2) enforcement of an easement by implication and injunctive relief; (3) damages for breach of contract against Mr. Pincelli and Mr. Serodino; (4) damages as a third-party beneficiary of the April 17, 2001 agreement between Mr. Pincelli and Mr. Serodino; (5) indemnity from Mr. Pincelli under their July 20, 2001 agreement; (6) damages for intentional trespass and interference with easement rights against Mr. Parker and the Baggetts; and (7) damages against Mr. Pincelli and Mr. Serodino for libel of title and/or engaging in a civil conspiracy to commit libel of title by executing and recording the abandonment.

Mr. Holder moved for a temporary injunction, seeking to enjoin Mr. Parker and Mr. Baggett from continuing construction of their respective fences and asking the court to order the removal of fence posts obstructing the Airstrip. Following a hearing, the chancery court declined to rule on the existence of an easement but enjoined Mr. Parker and Mr. Baggett from continuing construction of their fences. In addition, although the fence posts already obstructing the Airstrip were allowed to remain, the court ordered Mr. Parker and Mr. Baggett to remove any string connecting the posts.

[3] We refer to Mr. Holder's "Amended and Supplemental Verified Complaint." Mr. Holder's original complaint omitted the libel of title/conspiracy to commit libel of title claims and failed to name Mrs. Baggett as a defendant. The original complaint also included Mr. Sloan as a defendant. Mr. Sloan was voluntarily dismissed from the suit after he conveyed tracts I and II back to Mr. Serodino.

Mr. Parker filed an answer along with a counter- and cross-complaint. Mr. Parker's counter-/cross-complaint sought to quiet title to tract V or, in the alternative, indemnity from Mr. Pincelli. The Baggetts also filed an answer and a counter- and cross-complaint. Like Mr. Parker, the Baggetts sought either to quiet title to tract VI or indemnity from Mr. Pincelli. Additionally, the Baggetts filed a third-party complaint against the owners of three flag lots west of Tract I:[4] Dan Johnson and Randee Laskewitz; Regina W. Phillips; and David J. Higdon and Ann T. Bestimt. The Baggetts alleged that one end of the Airstrip should be positioned west of their property—at the eastern border of tract V. Under their theory, the Airstrip extended west of tract I, crossing three flag lots.

Of the third-party defendants, only Mr. Higdon and Ms. Bestimt responded to the third-party complaint. Alongside their answer, Mr. Higdon and Ms. Bestimt, proceeding pro se, filed a cross-complaint asserting by reference all of the claims contained in Mr. Holder's complaint against Mr. Pincelli, Mr. Serodino, Mr. Parker, and the Baggetts.

Although he made court appearances and was deposed, Mr. Pincelli offered no defense to the claims against him. As such, the chancery court entered a default judgment against Mr. Pincelli and in favor of Mr. Parker and the Baggetts on their cross-claims for indemnity. The court also entered a default judgment against Mr. Pincelli and in favor of Mr. Holder on certain claims. The court reserved judgment to the extent that Mr. Holder's claims against Mr. Pincelli implicated the liability of other defendants and on the issues of damages.

The court conducted a trial over three days on February 11 and 12, 2013, and May 14, 2013. On October 3, 2013, the court announced its ruling in a memorandum opinion. The court entered its Amended Order of Final Judgment on March 3, 2014,[5] incorporating its memorandum by reference.

The court concluded that an express easement and easement by reservation were created by virtue of the April 17, 2001 Pincelli-Serodino agreement and deed. Mr. Holder gained rights in the Airstrip easement through his purchase of tract IV from Mr. Pincelli. The court also found, in the alternative, that the facts gave rise to an

[4] See Appendix.

[5] The court's initial order of final judgment was entered on December 10, 2013. The court amended the order upon the motion of Mr. Holder. Mr. Holder's motion to alter or amend raised a number of issues with regard to the finality of the original order—namely, that the final order failed to address the issues of: damages against Mr. Pincelli for the orders of default in favor of Mr. Holder, Mr. Parker, and the Baggetts; whether Mr. Holder was an intended third-party beneficiary of the original Pincelli-Serodino agreement; and whether Mr. Pincelli and Mr. Serodino should be held liable to Mr. Holder for punitive damages under the libel of title claim. The amended order of final judgment specifically addressed each of these issues.

easement by implication. The court defined the northern and southern boundaries of the Airstrip by the tree line bordering the Airstrip. The court set the western end at the road right-of-way on the western boundary of tract I. The court found the eastern end was intended to coincide with the eastern boundary of tract VI—owned by the Baggetts.

With the eastern end of the Airstrip, however, the court found it necessary to relocate the easement to "the eastern edge of [Mr.] Holder's property." In doing so, the court terminated the Airstrip where it crossed the tracts owned by the Baggetts and Mr. Parker. This result followed from the finding that the Baggetts and Mr. Parker "did not have notice of the express easement created by [Mr.] Pincelli in favor of [Mr.] Serodino and/or [Mr.] Holder." Neither the Pincelli-Serodino nor the Pincelli-Holder agreements were recorded. Furthermore, the court found that Mr. Parker and the Baggetts made reasonable inquiry and were informed that the Airstrip had been abandoned. Mr. Holder also failed to give notice to potential third-parties of his rights to the Airstrip. Therefore, Mr. Parker's and the Baggetts' "rights to use their real estate [were] not affected by the express agreement between [Mr.] Pincelli, [Mr.] Holder, and [Mr.] Serodino." Accordingly, the court granted Mr. Parker's and the Baggetts' requests to quiet title to their properties.

The court also found that Mr. Pincelli and Mr. Serodino committed libel of title by recklessly and knowingly publishing a false statement about the Airstrip that caused Mr. Holder a pecuniary loss. As a result, the court held Mr. Pincelli and Mr. Serodino jointly and severally liable to Mr. Holder for his attorneys' fees and costs in the amount of $63,279.77. The court based this holding against Mr. Serodino on its findings that: (1) the abandonment was executed to facilitate Mr. Serodino's sale of tracts I and II to Mr. Sloan; (2) prior to execution of the abandonment, Mr. Serodino knew that the Airstrip easement was an impediment to this sale; (3) Mr. Holder had an interest in the Airstrip easement; (4) Mr. Serodino executed the abandonment representing himself and Mr. Pincelli as the sole parties to the Airstrip easement; (5) Mr. Serodino had failed to inquire whether Mr. Holder, Mr. Parker, or the Baggetts had acquired any rights in the Airstrip easement; (6) Mr. Serodino had acted with a reckless disregard for the truth or falsity of the statements contained in the abandonment by failing to so inquire; (7) Mr. Serodino had acted knowingly in executing the purported abandonment because his real estate agent had informed him that Mr. Holder claimed an interest in the Airstrip easement; and (8) Mr. Holder suffered a pecuniary loss in the amount of his reasonable attorneys' fees and costs.

As to the remainder of Mr. Holder's claims, the trial court found no evidence to support a civil conspiracy claim. The court found that Mr. Holder was not an intended third-party beneficiary of the Pincelli-Serodino agreement. As to the default judgment against Mr. Pincelli, the court declined to grant Mr. Holder, Mr. Parker, or the Baggetts monetary damages resulting from the judgment. The court also declined to award Mr. Holder punitive damages against Mr. Serodino or Mr. Pincelli. Mr. Holder

voluntarily dismissed his claims of intentional trespass against Mr. Parker and the Baggetts.

In regard to third-party defendants Mr. Higdon and Ms. Bestimt's cross-complaint, the court found that their deed made no reference to a right to use the Airstrip. "Therefore, their access over the [Airstrip] will be determined by where their flag lot intersects with the [Airstrip], if at all."

On appeal, Mr. Serodino argues that the trial court's order lacks finality. Assuming the order is final, Mr. Serodino argues the trial court erred in: (1) finding an express easement; (2) finding an implied easement; (3) finding libel of title; (4) imposing joint and several liability on Mr. Pincelli and himself; and (5) improperly apportioning all of Mr. Holder's attorneys' fees to Mr. Pincelli and himself. For his part, Mr. Holder claims the trial court erred in: (1) terminating the Airstrip easement where it crossed the properties of Mr. Parker and the Baggetts and (2) refusing to award him punitive damages against Mr. Serodino and Mr. Pincelli for libel of title. Mr. Holder also requests his attorneys' fees on appeal.

II. STANDARD OF REVIEW

Because this was a civil case heard without a jury, we review the trial court's findings of fact de novo with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *Shore v. Maple Lane Farms, LLC*, 411 S.W.3d 405, 414 (Tenn. 2013); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001); *Fowler v. Wilbanks*, 48 S.W.3d 738, 740 (Tenn. Ct. App. 2000). In order to preponderate against a trial court's findings, the evidence "must support another finding of fact with greater convincing effect." *Nw. Tenn. Motorsports Park, LLC v. Tenn. Asphalt Co.*, 410 S.W.3d 810, 816 (Tenn. Ct. App. 2011). When asked to review a trial court's determinations of witness credibility and the weight to be afforded particular testimony, we grant considerable deference to the trial judge who had the opportunity to observe the witnesses' demeanor and hear their in-court testimony. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997) (quoting *Randolph v. Randolph*, 937 S.W.2d 815, 819 (Tenn. 1996)); *Saddler v. Saddler*, 59 S.W.3d 96, 101 (Tenn. Ct. App. 2000). Unlike an appellate court, trial courts are able to observe a witness's live testimony, assess their demeanor, and evaluate other indicators of credibility. *See Saddler*, 59 S.W.3d at 101. Therefore, we will not overturn a trial court's assessment of credibility on appeal absent clear and convincing evidence to the contrary. *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999). We review questions of law de novo with no presumption of correctness. *Graham v. Caples*, 325 S.W.3d 578, 581 (Tenn. 2010); *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008) (citing *Perrin v. Gaylord Entm't Co.,* 120 S.W.3d 823, 826 (Tenn. 2003); *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997)).

III. ANALYSIS

A. FINALITY OF TRIAL COURT'S ORDER

If the trial court's order is not final, we lack subject matter jurisdiction to address the other issues raised by the parties. *In re Estate of Schorn*, 359 S.W.3d 192, 196 (Tenn. Ct. App. 2011); *see also* Tenn. R. App. P. 3; *but see* Tenn. R. Civ. P. 54.02 (allowing the trial court to certify an issue for appeal where fewer than all of the parties' claims have been resolved). Therefore, we must address the finality issue first. Mr. Serodino argues that Mr. Higdon and Ms. Bestimt's claims are unresolved by the trial court's order. As to these claims, the court held that "the deed of third-party defendants, [Mr. Higdon] and his wife [Ms. Bestimt], make no reference to the right to use the [Airstrip]. Therefore, their access over the [Airstrip] will be determined by where their flag lot intersects with the [Airstrip], *if at all*." (emphasis added). Mr. Serodino also argues that this ruling leaves unresolved whether the Airstrip impacts Mr. Higdon and Ms. Bestimt's land.

A final judgment "resolves all the issues in the case, 'leaving nothing else for the trial court to do.'" *In re Estate of Henderson*, 121 S.W.3d 643, 645 (Tenn. 2003) (quoting *State ex rel. McAllister v. Goode*, 968 S.W.2d 834, 840 (Tenn. Ct. App. 1997)). The court found that the Airstrip easement "extends west along the runway surface to the western boundary of the [Airstrip] as defined by road right-of-way shown on the west end of [Mr.] Serodino's property." By terminating the Airstrip easement on the western boundary of tract I,[6] the trial court determined that Mr. Higdon and Ms. Bestimt had no access to the Airstrip and that the easement did not extend across their property.[7] Therefore, the trial court's order is final, and we may consider the remainder of the issues raised on appeal.

B. EXPRESS EASEMENT

1. Existence of an Express Easement

Mr. Serodino argues that the trial court erred in finding an express easement and easement by reservation for the Airstrip. Mr. Serodino's argument centers on the contention that either the April 17, 2001 deed conveying tracts I–III from Mr. Pincelli to Mr. Serodino, or the Pincelli-Serodino agreement, contain latent and/or patent

[6] Mr. Serodino owned another tract west of Mr. Higdon and Ms. Bestimt's property. If the court were referring to Mr. Serodino's westernmost tract, the Airstrip would cross the third-party defendants' property. However, such a reading cannot be reconciled with the remainder of the court's order. In concluding that there was an easement by implication, the trial court found that Mr. Pincelli "was the common owner of the [Airstrip] before any separation of title occurred." Because Mr. Pincelli never owned Mr. Serodino's westernmost tract, the court could not have been referring to that tract.

[7] This determination has not been challenged on appeal.

ambiguities rendering the easement a nullity. We first examine whether an easement was created.

"An easement is an interest in property that confers on its holder a legally enforceable right to use another's property for a specific purpose." *Hall v. Pippin*, 984 S.W.2d 617, 620 (Tenn. Ct. App. 1998); *see also Pevear v. Hunt*, 924 S.W.2d 114, 115 (Tenn. Ct. App. 1996). Easements may arise in a number of ways in Tennessee, including, but not limited to: (1) express grant; (2) reservation; or (3) implication. *Pevear*, 924 S.W.2d 115-16. In the case of an express easement, there must be a document evincing the parties' intent that complies with the relevant statute of frauds, Tennessee Code Annotated § 29-2-101 (2012). *Cellco P'ship v. Shelby Cnty.*, 172 S.W.3d 574, 593 (Tenn. Ct. App. 2005); *see also Smith v. Evans*, No. M2007-02855-COA-R3-CV, 2008 WL 3983117, at *2 (Tenn. Ct. App. Aug. 27, 2008) ("To create an easement by express grant, there must be a writing containing plain and direct language evincing the grantor's intent to create a right in the nature of an easement rather than a license.").

In reviewing a deed to determine whether it gives rise to an express easement, the parties' intentions are of the utmost importance. We seek to ascertain those intentions by first examining the language of the deed and then "considering these words in the context of the deed as a whole." *Mitchell v. Chance*, 149 S.W.3d 40, 44 (Tenn. Ct. App. 2004). Interpretation of a deed's meaning is a matter of law subject to de novo review. *Id.* at 45. Generally speaking, parol evidence that "adds to, varies, or otherwise contradicts the language of the deed" is inadmissible as proof of the parties' intent. *Id.* at 44. However, such evidence may be introduced to resolve a latent, as opposed to a patent, ambiguity. *Id.*

Our courts have previously addressed the distinction between latent and patent ambiguities. A latent ambiguity exists where:

> "the equivocality of expression or obscurity of intention does not arise from the words themselves, but from the ambiguous state of extrinsic circumstances to which the words of the instrument refer, and which is susceptible of explanation by the mere development of extraneous facts, without altering or adding to the written language, or requiring more to be understood thereby than will fairly comport with the ordinary or legal sense of the words and phrases made use of."

Estate of Burchfiel v. First United Methodist Church of Sevierville, 933 S.W.2d 481, 482 (Tenn. Ct. App. 1996) (quoting *Weatherhead v. Sewell*, 28 Tenn. (9 Hum.) 272, 295 (1848)). A patent ambiguity is "'one produced by the uncertainty, contradictoriness, or deficiency of the language of an instrument, so that no discovery of facts, or proof of declarations, can restore the doubtful or smothered sense without adding ideas which the

actual words will not themselves sustain.'" *Mitchell*, 149 S.W.3d at 44 (quoting *Weatherhead*, 28 Tenn. at 295). The difference is that a patent ambiguity appears on the face of a deed whereas a latent ambiguity arises upon consideration of extrinsic circumstances. *Id.* at 44-45. In contrast to a latent ambiguity, parol evidence may not be introduced to resolve a patent ambiguity, and such a deed must fail for indefiniteness. *See id.* at 44.

Mr. Serodino argues that a patent, or at least latent, ambiguity exists in the deed language that the property "is subject to a right of way for an airstrip 3000' x 200', presently known as 'Doe Run Airstrip.'" However, the deed does unambiguously express an intention to create a right in the nature of an easement for the Airstrip. *See id.* at 45 (finding a deed unambiguously gave rise to an express easement where it stated that the property conveyed was subject to a "right-of-way"). Any ambiguity relates solely to the location of the easement, a subject we discuss more fully below. Therefore, the trial court correctly concluded that the Pincelli-Serodino agreement and deed created an express easement and an easement by reservation.

Our inquiry does not end with the conclusion that an express easement was created. We must also consider what or who an easement benefits. There are two broad categories of easements: easements appurtenant and easements in gross. *Cellco P'ship*, 172 S.W.3d at 588. An easement appurtenant "benefit[s] another tract of land, the use of [the] easement being incident to the ownership of that other tract." *Black's Law Dictionary* 586 (9th ed. 2009). The tract benefitted is deemed the dominant estate, and tract burdened by the easement is deemed the servient estate. *Cellco P'ship*, 172 S.W.3d at 588. "Easements appurtenant run with the land and may be enforced by subsequent purchasers of the dominant tenement against owners of the servient tenement." *Newman v. Woodard*, 288 S.W.3d 862, 865 (Tenn. Ct. App. 2008) (citing *Cellco P'ship*, 172 S.W.3d at 588).

Easements in gross represent a personal right to use the property of another. *Cellco P'ship*, 172 S.W.3d at 588. These types of easement also have a servient estate burdened by the easement holder's rights, but because they are personal, the rights are not attached to a dominant estate. *Id.* "The beneficiary need not, and usu[ally] does not, own any land adjoining the servient estate." *Black's Law Dictionary* 586 (9th ed. 2009). In Tennessee, "an easement is not . . . presumed to be in gross, when it can fairly be construed to be appurtenant." *Goetz v. Knoxville Power & Light Co.*, 290 S.W. 409, 414 (Tenn. 1926).

The Pincelli-Serodino agreement, incorporated by reference into the deed, indicates that the Airstrip easement is appurtenant. The agreement requires that transfer or assignment of any property affected by the Airstrip easement must be subject to its terms. Modification of the agreement requires the unanimous consent of all property

owners with land subject to the Airstrip easement. The Airstrip easement clearly runs with the land.

Because the easement is appurtenant, rights in the Airstrip automatically passed upon the transfer of tract IV from Mr. Pincelli to Mr. Holder. As the trial court noted, "Mr. Pincelli's reservation gave rise to his right to convey to others the right to use the airstrip." Furthermore, the easement appurtenant was reciprocal. *See Southall v. Humbert*, 685 A.2d 574, 578 (Pa. Super. Ct. 1996) (concluding that by both granting and reserving an easement, the parties burdened their parcels for the common use of the entire tract covered by the easement). Both Mr. Serodino and Mr. Pincelli had rights in the Airstrip easement as landowners. Therefore, their property interests are as both dominant and servient tenement holders subject to the other's easement rights.

2. Location of the Easement

Even though drafters of deeds are encouraged to include a precise legal description of the servient estate and the portion of the estate over which the easement runs, instruments lacking "an easement's location or dimensions are commonplace." *Mitchell*, 149 S.W.3d at 45-46. "[T]hese sorts of omissions and oversights are not necessarily fatal to the easement." *Id.* at 46. An easement created without a precise location is sometimes referred to as a "general easement." *USA Cartage Leasing, LLC v. Baer*, 32 A.3d 88, 110 (Md. Ct. Spec. App. 2011). These "general easements" express a clear intention to create an easement, but lack a sufficient description to properly locate it. *Id.*

While there is no ambiguity as to the existence of a general easement, the lack of details as to its location leaves an uncertainty that must be resolved. When confronted with such an issue, we may consider extrinsic evidence of the parties' intent to determine the easement's location. *Mitchell*, 149 S.W.3d at 46; *see also ABN AMRO Mortg. Group, Inc. v. S. Sec. Fed. Credit Union*, 372 S.W.3d 121, 127 (Tenn. Ct. App. 2011) ("Courts are reluctant to declare instruments void for an uncertain description and will look to attendant facts to make them certain."). In doing so, we may take into account:

> (1) the purpose of the easement, (2) the geographic relationship between the dominant and the servient tenements, (3) the use of each of the tenements, (4) the benefit to the easement holder compared to the burden on the servient tenement owner, (5) the admissions of the parties, and (6) the use existing at the time of the easement's creation.

Mitchell, 149 S.W.3d at 46.

As part of this consideration, where a deed granting an easement refers to an already existing right-of-way, we may construe the dimensions and location of the easement to conform to the right-of-way already in existence at the creation of the

easement. *Id.*; *see also Wilson v. DeGenaro*, 415 A.2d 1334, 1335 (Conn. Super. Ct. 1979); *DeFelice Land Corp. v. Citrus Lands of La., Inc.*, 330 So. 2d 631, 634 (La. Ct. App. 1976); *Taylor v. Solter*, 231 A.2d 697, 701 (Md. 1967); *Miller v. Snedeker*, 101 N.W.2d 213, 215 (Minn. 1960); *James v. Chicago Title Ins. Co.*, 339 P.3d 420, 423 (Mont. 2014); *Cleveland v. Tinaglia*, 582 N.W.2d 720, 724 (S.D. 1998); *Waskey v. Lewis*, 294 S.E.2d 879, 881 (Va. 1982); *R.C.R., Inc. v. Rainbow Canyon, Inc.*, 978 P.2d 581, 588 (Wyo. 1999).

Here, the Pincelli-Serodino deed and agreement do not contain a legal description precisely locating the easement. The Pincelli-Holder deed and agreement have the same failing. This issue is further complicated by the Pincelli-Serodino deed's and agreement's designations of the Airstrip as a 3,000' x 200' area. Tracts I-VI cannot accommodate a straight-line 3,000' long easement.

In making its ruling, the trial court considered extrinsic evidence of the parties' intent and attempted to determine the easement's location. Based on the survey conducted by Phil Bice, aerial photography of the Airstrip, and the testimony of the witnesses, the trial court conformed the boundaries of the Airstrip to its dimensions and location existing at the time of the creation of the easement. The court determined that the original eastern end of the Airstrip began on the Baggetts' property, at tract VI. From there, the Airstrip ran to the western boundary of Mr. Serodino's property, at tract I. The trial court defined the north-south boundary of the Airstrip as the tree line which was roughly forty feet in width. As a result, the boundaries of the Airstrip as found by the court were less than the 3000' x 200' dimensions stated in the Pincelli-Serodino agreement and deed.

Based on our review of the record, we find no error in how the trial court construed the dimensions and location of the Airstrip easement. Because of the indefinite nature of the location of the Airstrip easement, the trial court correctly considered extrinsic evidence in making its ruling notwithstanding the dimensions of the Airstrip referred to in the Pincelli-Serodino deed and agreement. In this instance, the court appropriately set the dimensions of the easement at less than those provided for in the deed and agreement where the proof showed actual use of the Airstrip involved less area. *See Tenn. Pub. Serv. Co. v. Price*, 65 S.W.2d 879, 881 (Tenn. Ct. App. 1932) ("The rule is well settled that where a grant of an easement is general as to the extent of the burden to be imposed on the servient tenement, an exercise of the right, with the acquiescence and consent of both parties, in a particular course or manner, fixes the right and limits it to the particular course or manner in which it has been enjoyed."). Accordingly, we affirm trial court's ruling on the location of the Airstrip easement.

C. IMPLIED EASEMENT

The trial court found, in the alternative, that even if the Pincelli-Serodino agreement and deed failed to create an express easement, the facts of this case were sufficient to give rise to an easement by implication. An easement by implication is an exception "to the general rule that easements must be created by either an express writing or by prescription." *Barrett v. Hill*, No. 01A01-9806-CV-00295, 1999 WL 802642, at *2 (Tenn. Ct. App. Oct. 7, 1999). Easements by implication are disfavored in the law. *Cellco P'ship*, 172 S.W.3d at 589.

Because we conclude that the trial court correctly found an express easement for the Airstrip, we decline to consider whether the facts of this particular case also give rise to an easement by implication. *See id.* at 594-95 (concluding that we should determine the parties' easement rights by reference to the granting document and only turn to the surrounding circumstances where the instrument's meaning is in doubt). The Pincelli-Serodino deed and agreement unambiguously express an intention to create a right in the nature of an easement, so resorting to a doctrine of restricted application is unnecessary. *See id*. at 589 (policy favors restricting the use of the easement by implication doctrine).

D. TERMINATION OF THE EASEMENT ON MR. PARKER'S AND THE BAGGETTS' TRACTS

Next we turn to an issue raised by Mr. Holder. Although finding that the Airstrip easement extended across all six tracts, the trial court terminated the Airstrip easement short of the tracts owned by Mr. Parker and the Baggetts, tracts V and VI respectively. The trial court relocated the eastern end of the Airstrip easement at the eastern boundary of Mr. Holder's property, tract IV. The court based this decision on a lack of notice, finding, in pertinent part, as follows:

> [b]y virtue of the fact that neither the [Pincelli-Serodino] Agreement . . . nor the [Pincelli-Holder] Agreement . . . were recorded, the Baggetts and [Mr.] Parker did not have notice of the express easement created by [Mr.] Pincelli in favor of [Mr.] Serodino and/or [Mr.] Holder. Therefore, their rights to use their real estate are not affected by the express agreement."

Furthermore, the court found that Mr. Parker and the Baggetts reasonably inquired into the existence of the Airstrip before purchasing their property, "and were told that the [Airstrip] had been abandoned," by Mr. Pincelli. The court also found that Mr. Holder did nothing to provide notice to potential third parties of his easement rights. Based on these findings, the court granted Mr. Parker's and the Baggetts' requests to quiet title in tracts V and VI. Mr. Holder asserts this was error.

Mr. Holder argues that the owner of a dominant estate may enforce his easement rights against a subsequent purchaser of the servient estate without notice based on his reading of our decisions in *Luttrell v. Hidden Valley Resorts, Inc.*, No. E2009-00485-COA-R3-CV, 2009 WL 5173709 (Tenn. Ct. App. Dec. 30, 2009) and *Barrett v. Hill*, No. 01A01-9806-CV-00295, 1999 WL 802642 (Tenn. Ct. App. Oct. 7, 1999). In *Luttrell*, the plaintiff bought a tract of land and was granted an express easement in her deed for sewer lines running under the adjoining tract of land. *Luttrell*, 2009 WL 5173709, at *1. The grantor then sold the adjoining tract but failed to mention the easement in favor of the plaintiff in the deed transferring the servient estate. *Id.* The purchaser of the servient estate placed heavy machinery on its land in such a way that it interfered with the plaintiff's use of the easement. *Id.* The plaintiff filed suit, seeking an injunction preventing the defendant from interfering with her easement rights. *Id.* at *2. The trial court denied the plaintiff's request for relief, finding that the easement was unenforceable because the defendant had purchased the servient estate without notice of the easement. *Id.*

In reversing the trial court, we relied on our decision in *Barrett*, which concluded that the holder of an *implied* easement appurtenant may enforce it against a purchaser of the servient estate even where the purchaser lacks notice of the easement. *Id.* at *5; *see also Barrett*, 1999 WL 802642, at *5. The rule as announced in *Luttrell* is that the holder of an *express* easement appurtenant may enforce their rights against a subsequent purchaser of the servient estate regardless of whether the purchaser had notice of the burden. *Luttrell*, 2009 WL 5173709, at *5.

The rule that burdens of an express easement appurtenant pass regardless of whether a purchaser has notice indicates a preference in Tennessee for the rights of a dominant tenement holder over the rights of a bona fide purchaser without notice. One justification for such a rule is that the purchaser could potentially take notice of the easement through an examination of deeds from the common grantor. *Id.* at *5 ("At least in the case of an express easement, it could be discovered by looking at all conveyances made against the common tract by the common grantor."). Although the majority rule in other states seems to be that the subsequent purchaser of a servient estate must have some form of notice for the burden of an easement to pass on to them, it is often held that mention of the easement in a deed by the common grantor is sufficient to establish constructive notice. *See Dukes v. Link*, 315 S.W.3d 712, 717 (Ky. Ct. App. 2010); *Earl v. Pavex, Corp.*, 313 P.3d 154, 162-63 (Mont. 2013); *Southall*, 685 A.2d at 578; *Ten Woodruff Oaks, LLC v. Point Dev. LLC*, 683 S.E.2d 510, 515 (S.C. Ct. App. 2009).

In this case, as the holder of an express easement appurtenant, Mr. Holder's rights to the Airstrip easement continue regardless of whether Mr. Parker and the Baggetts had actual notice of the easement when purchasing tracts V and VI. Even under the more exacting test generally applied in other states, Mr. Parker and the Baggetts would have had constructive notice of the Airstrip easement from the deeds made by the common

grantor. The deeds to Mr. Serodino and to Mr. Holder from Mr. Pincelli, the common grantor, reference the Airstrip easement. Although the Pincelli-Serodino agreement creating the Airstrip easement was not recorded, the deeds to Mr. Serodino and Mr. Holder incorporate the agreement by reference. Furthermore, the evidence reveals that Mr. Parker and the Baggetts had actual notice of the use of their properties as an airstrip because they asked about the Airstrip when purchasing property from Mr. Pincelli.

In light of this evidence, we reverse the trial court's decision relocating the eastern boundary of the Airstrip easement and quieting title to tracts V and VI. We find this appropriate in spite of Mr. Pincelli's representations to Mr. Parker and the Baggetts that the Airstrip easement was abandoned. Mr. Pincelli's false assertions of abandonment to Mr. Parker and the Baggetts are insufficient to terminate Mr. Holder's rights to the Airstrip easement. An important corollary to our rule that the burdens of an express easement appurtenant pass regardless of whether a purchaser has notice is that false assertions of abandonment by a common grantor are insufficient to terminate the rights of the dominant estate. *See Hall*, 984 S.W.2d at 620-21 (concluding that abandonment must be proved by clear and convincing evidence of the *easement holder's* intention to abandon his property rights). On remand, the trial court should consider the issue of damages suffered by Mr. Parker and the Baggetts on account of Mr. Pincelli's false assertions of abandonment.

E. LIBEL OF TITLE

Regardless of our conclusion that an express easement existed for the Airstrip, Mr. Serodino argues that the trial court made numerous errors in holding him jointly and severally liable with Mr. Pincelli for libel of title. Libel of title occurs where 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.

Phillips v. Woods, No. E2007-00697-COA-R3-CV, 2008 WL 836161, at *7 (Tenn. Ct. App. Mar. 31, 2008) (quoting 53 C.J.S. *Libel and Slander* § 310 (2005)). To establish such a claim, a plaintiff must prove that: (1) he has an interest in the property; (2) the defendant published false statements about the title to the property; (3) the defendant acted maliciously; and (4) the false statements proximately caused the plaintiff a pecuniary loss. *Cowart v. Hammontree*, No. E2013-00416-COA-R3-CV, 2013 WL 6211463, at *13 (Tenn. Ct. App. Nov. 27, 2013); *Brooks v. Lambert*, 15 S.W.3d 482, 484 (Tenn. Ct. App. 1999). "Statements made with reckless disregard . . . as to whether the statements are false may be malicious within the scope of a libel of title action." *Cowart*,

2013 WL 6211463, at *13. The plaintiff must expressly allege malice or "facts that would give rise to a reasonable inference that the defendant acted maliciously." *Phillips*, 2008 WL 836161, at *7. A good faith but erroneous claim of title does not provide a cause of action for libel of title. *Ezell v. Graves*, 807 S.W.2d 700, 704 (Tenn. Ct. App. 1990).

The trial court made findings of fact specifically establishing each element of Mr. Holder's libel of title claim. On the first element, the court found that Mr. Holder had an interest in the Airstrip easement. As to the second element, the court found the abandonment executed and recorded by Mr. Serodino and Mr. Pincelli contained false statements about the title to the Airstrip easement. The document recited that Mr. Serodino and Mr. Pincelli were "the sole parties" to the Airstrip easement. The act of recording the abandonment constituted publication for purposes of a libel of title claim. The court also found that the abandonment was recorded for the purpose of facilitating the sale of tracts I and II from Mr. Serodino to Mr. Sloan and that, prior to executing the abandonment, Mr. Serodino knew the Airstrip easement was an impediment to this sale. Mr. Serodino does not challenge any of these factual findings or that the first two elements of the libel of title claim were established.

As to the third element, Mr. Serodino asserts that the trial court erred in finding that he acted maliciously. The court found that, although Mr. Serodino expected all lot owners to sign an agreement for the Airstrip, "[he] did not inquire of [Mr.] Holder, [Mr.] Parker, or the Baggetts as to whether they had acquired any rights in and to the [Airstrip] prior to executing and recording [the abandonment]." By failing to make such an inquiry, the court concluded Mr. Serodino acted "with a reckless disregard for the truth or falsity of the statements" in the abandonment—establishing malice.

We have found that "'mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth.'" *McCluen v. Roane Cnty. Times, Inc.*, 936 S.W.2d 936, 941 (Tenn. Ct. App. 1996) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974)). However, Mr. Serodino did not merely fail to investigate. He also expected the other land owners to sign the agreement for Airstrip easement, indicating he acted with a "'high degree of awareness of . . . [the] probable falsity'" of his statements in the abandonment. *Id.* (quoting *Gertz*, 418 U.S. at 332). Furthermore, because Mr. Serodino's real estate agent, John Mitchum, had spoken with Mr. Holder and informed Mr. Serodino that Mr. Holder claimed rights in the Airstrip easement, Mr. Serodino knew that the abandonment was false when he recorded it and "acted maliciously on this ground as well."

Mr. Serodino also argues that the trial court failed to consider the appropriate burden of proof in finding malice. He asserts that it is unclear in Tennessee whether the preponderance of the evidence standard or the clear and convincing evidence standard, required for a finding of "actual malice" against a public figure, applies to the finding of

malice. *Tomlinson v. Kelley*, 969 S.W.2d 402, 405 (Tenn. Ct. App. 1997). We find the argument unavailing.

Error by a trial court does not require reversal of a judgment unless the error "more probably than not affected the judgment or would result in prejudice to the judicial process." Tenn. R. App. P. 36(b). In making its findings of malice, the trial court cited *Tomlinson v. Kelley*, 969 S.W.2d 402 (Tenn. Ct. App. 1997), indicating that it made its finding of malice by the more exacting clear and convincing evidence standard. The trial court's finding that Mr. Serodino executed the abandonment with Mr. Pincelli purporting to be the sole parties to the Airstrip easement, all while knowing that Mr. Holder claimed an interest in the Airstrip, is certainly enough to establish malice under either standard.

Finally, Mr. Holder had the burden of demonstrating that Mr. Serodino's false statements proximately caused him a pecuniary loss. Although attorneys' fees are not normally awarded in a civil action absent a "contract, statute or recognized ground of equity," *State ex rel. Orr v. Thomas*, 585 S.W.2d 606, 607 (Tenn. 1979), an exception exists for a libel of title claim. Where a plaintiff succeeds in bringing a libel of title claim, his attorneys' fees are recognized as special damages. *See Kinzel Springs P'ship v. King*, No. E2008-01555-COA-R3-CV, 2009 WL 2341546, at *15 (Tenn. Ct. App. July 30, 2009); *Ezell*, 807 S.W.2d at 703. This is because "[t]he sole way of dispelling another's wrongful assertion of title is by hiring an attorney and litigating." *Ezell*, 807 S.W.2d at 703. The trial court found that Mr. Holder suffered a pecuniary loss in the amount of his reasonable costs and attorneys' fees, $63,279.77. Although Mr. Serodino does not dispute the fact that attorneys' fees are an appropriate measure of damages in a libel of title suit, he does take issue with the way those fees were apportioned in this case. He also argues that the trial court erred by not ruling on his advice of counsel defense.

1. Advice of Counsel Defense

Mr. Serodino argues that he could not have committed libel of title because he sought the advice of counsel in executing and recording the abandonment. Indeed, we have held that "advice of counsel can establish the existence of probable cause when the advice is honestly sought and all the material facts have been presented to counsel." *Phillips*, 2008 WL 836161, at *7. A plaintiff who meets these criteria is entitled to complete immunity from liability for libel of title as a matter of law. *Id.* However, a defense that was not considered by the trial court is generally considered waived on appeal. *See* Tenn. R. App. P. 13(a) advisory comm'n cmt.; *Hall v. Haynes*, 319 S.W.3d 564, 584 (Tenn. 2010); *Milton v. Etezadi*, No. E2012-00777-COA-R3-CV, 2013 WL 1870052, at *4 (Tenn. Ct. App. May 3, 2013).

Here, Mr. Serodino claims that he properly raised his advice of counsel defense in his motion for summary judgment, but the trial court failed to properly rule on it. Our review of the record indicates this issue was not properly raised in Mr. Serodino's motion

for summary judgment or at trial. Therefore, Mr. Serodino has waived his right to raise the advice of counsel as a defense on appeal. *See Novack v. Fowler*, No. W2011-01371-COA-R9-CV, 2012 WL 403881, at *5 (Tenn. Ct. App. Feb. 9, 2012).

2. Imposition of Joint and Several Liability

Mr. Serodino argues that the trial court erred in imposing joint and several liability against Mr. Pincelli and himself for the libel of title claim. It is true that in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992), our Supreme Court held that the adoption of a comparative fault system rendered "the doctrine of joint and several liability obsolete." *Id.* at 58. The Court has since tempered its view on joint and several liability, and it is now understood to stand for the proposition that the "adoption of comparative fault abrogated the use of the doctrine of joint and several liability in those cases where the defendants are charged with separate, independent acts of negligence." *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 87 (Tenn. 2001). However, "the doctrine continues to be an integral part of the law in certain limited instances." *Id.* One of these limited instances is where joint tortfeasors act in concert with one another. *Resolution Trust Corp. v. Block*, 924 S.W.2d 354, 356 (Tenn. 1996).

Under these circumstances, we find no error in holding Mr. Serodino jointly and severally liable with Mr. Pincelli for libel of title. Mr. Serodino and Mr. Pincelli acted together in executing and recording the abandonment of the Airstrip easement. This concerted act resulted in the libel of title, making this one of those instances where joint and several liability is appropriate.

3. Division of Fees

Mr. Serodino also argues that the trial court improperly apportioned Mr. Holder's attorneys' fees. The court awarded Mr. Holder his attorneys' fees based on an affidavit submitted by Mr. Holder's attorneys stating that their total costs and fees in prosecuting the lawsuit were $63,279.77. Because Mr. Parker and the Baggetts were also defendants in this suit, Mr. Serodino takes issue with the award of the entirety of Mr. Holder's attorneys' fees against Mr. Serodino and Mr. Pincelli as damages for libel of title. He argues that the costs associated with bringing suit against Mr. Parker and the Baggetts should not be awarded against him as damages for libel of title. However, as our Supreme Court has stated:

> One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.

Pullman Standard, Inc. v. Abex Corp., 693 S.W.2d 336, 340 (Tenn. 1985) (quoting Restatement (Second) of Torts § 914(2) (1979)); *see also Johnson v. Madison Cnty.*, No. W2011-00343-COA-R3-CV, 2011 WL 4496681, at *4-5 (Tenn. Ct. App. Sept. 29, 2011).

In this case, Mr. Holder would not have needed to bring suit against Mr. Parker and the Baggetts were it not for Mr. Pincelli and Mr. Serodino's false assertions of abandonment. Therefore, the trial court properly awarded Mr. Holder all of his attorneys' fees against Mr. Serodino and Mr. Pincelli.

4. Availability of Punitive Damages

In addition to the issues raised by Mr. Serodino, Mr. Holder argues that the trial court also erred in refusing to award punitive damages upon its finding of libel of title. A court can award punitive damages only where it finds that a defendant acted intentionally, fraudulently, maliciously, or recklessly. *Lane v. Becker*, 334 S.W.3d 756, 764 (Tenn. Ct. App. 2010). This conduct must be proved by clear and convincing evidence, *Barnett v. Lane*, 44 S.W.3d 924, 928 (Tenn. Ct. App. 2000), and the award of punitive damages is only appropriate in cases involving "'the most egregious wrongs.'" *Lane*, 334 S.W.3d at 764 (quoting *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992)). The grant of such damages is within the "sound discretion of the trier of fact." *Huckeby v. Spangler*, 563 S.W.2d 555, 558 (Tenn. 1978); *see also B.F. Myers & Son v. Evans*, 612 S.W.2d 912, 916 (Tenn. Ct. App. 1980).

Under the facts of this case, we find no abuse of discretion in declining to award punitive damages. The finding by clear and convincing evidence that Mr. Serodino acted maliciously could justify an award of punitive damages. However, we do not consider this to be the most egregious of cases. We also see no need to punish Mr. Serodino, to deter him from committing similar acts, or to make him a public example. *See Goff v. Elmo Greer & Sons Const. Co.*, 297 S.W.3d 175, 187 (Tenn. 2009).

F. ATTORNEYS' FEES ON APPEAL

Mr. Holder also requests an award of his attorneys' fees on appeal as a part of his damages under the libel of title claim. It is in our discretion to award attorneys' fees on appeal. *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995). In considering such a request we evaluate: "the requesting party's ability to pay such fees, the requesting party's success on appeal, whether the appeal was taken in good faith, and any other equitable factors relevant in a given case." *Moran v. Willensky*, 339 S.W.3d 651, 666 (Tenn. Ct. App. 2010). After reviewing these factors, we respectfully decline to award Mr. Holder his attorneys' fees on appeal.

IV. CONCLUSION

For the foregoing reasons, we reverse the trial court's decision relocating the eastern boundary of the easement and quieting title to tracts V and VI. We affirm the judgment in all other respects. Accordingly, the judgment is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

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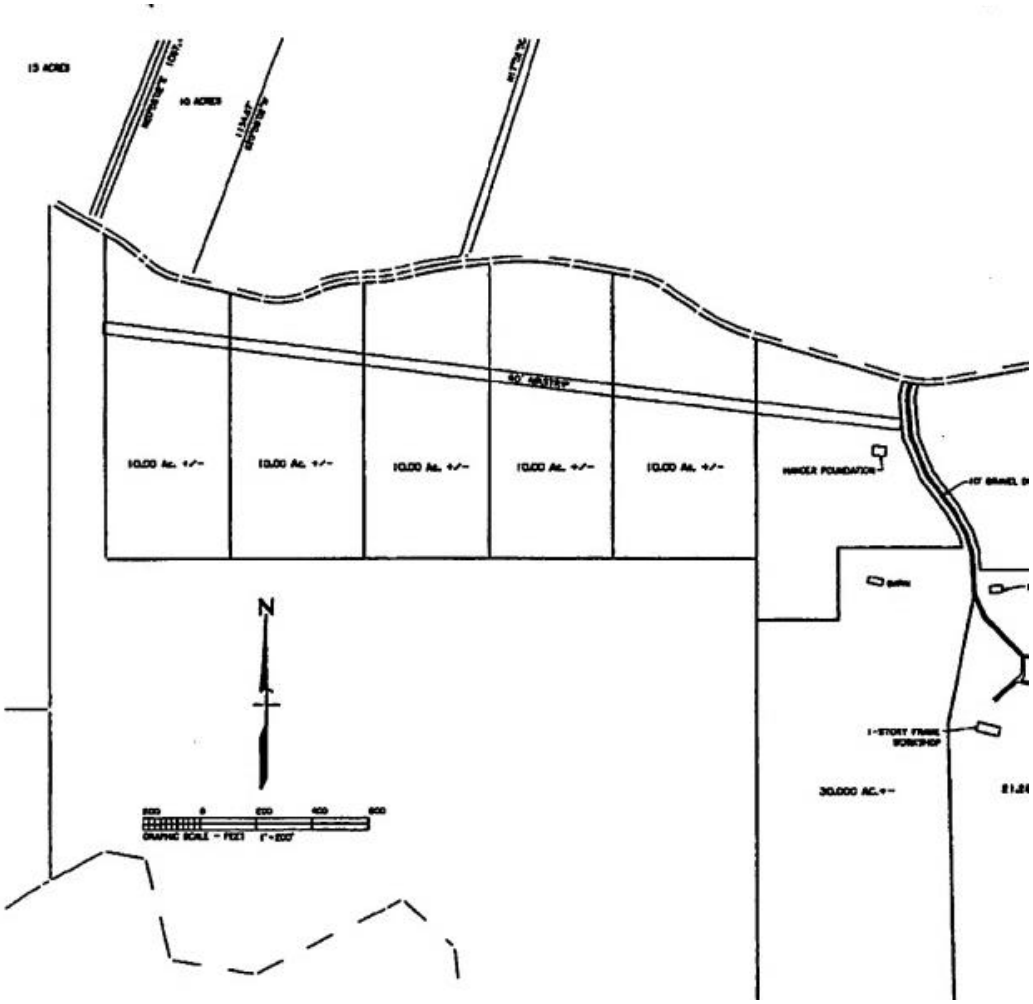
W. NEAL McBRAYER, JUDGE

APPENDIX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