IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 3, 2020

ERIC MAGNESS v. EDITH G. COUSER

Appeal from the Circuit Court for Williamson County
No. 09037 James G. Martin, III, Judge

No. M2019-01138-COA-R3-CV

This is a nuisance case. Appellant alleges that Appellee created a nuisance when he caused: (1) debris and gravel to drain onto her land; and (2) a foul sewage odor to permeate her land. The trial court dismissed her claim. Finding no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded

KENNY ARMSTRONG, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and ANDY D. BENNETT, J. joined.

Bob Lynch, Jr., Nashville, Tennessee, for the appellant, Edith G. Couser.

Todd Moore, Brentwood, Tennessee, for the appellee, Eric Magness.

OPINION

I. Background

The facts of this case are quite protracted; in the interest of judicial economy, we will provide a truncated version of the relevant facts and procedure. Edith Couser ("Appellant") and Eric Magness ("Appellee") are neighbors who have been involved in a contentious and litigious dispute that began in June 2004. The parties were originally involved in a lawsuit in the Williamson County Chancery Court ("Chancery Court"), and this Court resolved part of that dispute in 2008 in ***Magness v. Couser***, No. M2006-00872-COA-R3-CV, 2008 WL 204116 (Tenn. Ct. App. Jan. 24, 2008). The remaining issues from the Chancery Court suit were consolidated and tried in the Circuit Court of Williamson County ("trial court"). The trial court's order is now the subject of this appeal.

Ms. Couser owns approximately 40 acres of land in Williamson County that abut Mr. Magness's 3.5 acres on three sides. Around June 2004, Mr. Magness began construction of a large industrial building (the "large building") on his property; the large building was located only a short distance from Ms. Couser's property line. To create the foundation of the large building, Mr. Magness poured rock and fill material, compacted it, and poured concrete over the compacted mixture. Ms. Couser alleges that the construction of the large building resulted in gravel and debris draining onto her land. In September 2004, she obtained a temporary injunction, which restrained Mr. Magness from "permitting or causing further erosion of fill dirt and gravel from the construction site of [his] property onto the property of [Ms.] Couser." To prevent runoff from the construction site, Mr. Magness placed bales of hay along the line between his and Ms. Couser's properties. Despite this measure, and the fact that construction of the large building ended in 2006, Ms. Couser maintains that debris continues to flow onto her property. Ms. Couser also alleges that, from 2005 through 2008, Mr. Magness's property emitted a sewage smell and foul odor related to the septic tank he installed for the large building.

On January 21, 2009, Mr. Magness filed a complaint against Ms. Couser for malicious prosecution (stemming from a criminal case Ms. Couser initiated against him in 2008) in the trial court. On March 16, 2009, Ms. Couser filed an answer and counterclaim asserting claims for trespass, nuisance, conversion, and outrageous conduct. On March 27, 2009, Mr. Magness answered the counterclaim and denied all liability. He later amended his complaint to include additional claims of defamation, slander, and nuisance.

On July 28, 2010, the parties engaged in mediation and reached the following agreement ("the Agreement"):

> 3. [Mr. Magness] will build a retaining wall consisting of railroad ties on the property behind the large [building], identified in the exhibits of Mr. Magness's deposition, and the purpose of this retaining wall is to prevent the runoff of gravel or debris onto the [Cousers'] property.

After mediation, the case was inactive for five years. On January 11, 2016, the trial court clerk informed the parties that the case would be dismissed absent a motion to continue. Ms. Couser filed a motion to continue on February 24, 2016. On December 19, 2017, the trial court entered an Agreed Order, which, *inter alia*: (1) consolidated all outstanding issues from the Circuit and Chancery Court cases; and (2) named Tommy Couser, Ms. Couser's son, as a defendant/counter-plaintiff.

On January 26, 2018, the Cousers filed their final answer to the amended complaint and their final counter-complaint against Mr. Magness. On June 7, 2018, Mr. Magness filed his answer to the counter-complaint. A hearing was held on October 31,

2018 and February 7, 2019. On May 29, 2019, the trial court entered its final order, wherein it held, *inter alia*, that: (1) Mr. Magness's claims for malicious prosecution, defamation, and slander were dismissed; (2) Mr. Magness's claim for nuisance was granted; (3) the Cousers' claims for trespass and nuisance were dismissed; and (4) Mr. Magness was to build the retaining wall as described in the Agreement.[1] Ms. Couser appeals only the denial of her nuisance claim.[2]

II. Issue

Ms. Couser's sole issue for review is whether the trial court erred in dismissing her nuisance claim.

III. Standard of Review

We review a non-jury case "*de novo* upon the record with a presumption of correctness as to the findings of fact, unless the preponderance of the evidence is otherwise." ***Bowden v. Ward***, 27 S.W.3d 913, 916 (Tenn. 2000) (citing Tenn. R. App. P. 13(d)). The trial court's conclusions of law are reviewed *de novo* and "are accorded no presumption of correctness." ***Brunswick Acceptance Co., LLC v. MEJ, LLC***, 292 S.W.3d 638, 642 (Tenn. 2008).

IV. Analysis

Ms. Couser appeals the trial court's dismissal of her nuisance claim. In ***Shore v. Maple Lane Farms, LLC***, 411 S.W.3d 405, 415-16 (Tenn. 2013), Justice Koch explained that

> [a] common-law nuisance is a tort characterized by interference with the use or enjoyment of the property of another. W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 87, at 619 (5th ed.1984) [hereinafter "*Prosser & Keeton* "]. A nuisance is anything that annoys or disturbs the free use of one's property or that renders the property's ordinary use or physical occupation uncomfortable. It extends to everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of the property. ***Pate v. City of Martin***, 614 S.W.2d 46, 47 (Tenn. 1981); ***Caldwell v. Knox Concrete Prods., Inc.***, [391 S.W.2d 5, 9 (Tenn. Ct. App. 1964)].

[1] At the February 7, 2019 trial, counsel for Ms. Couser informed the trial court that she would not proceed on her conversion or outrageous conduct claims.

[2] We note that although Tommy Couser was added as a defendant/counter-plaintiff in the trial court, he is not listed as an appellant in this appeal.

Shore, 411 S.W.3d at 415. "The nuisance consists of the harmful effects or the danger of the thing." ***Zollinger v. Carter***, 837 S.W.2d 613, 615 (Tenn. Ct. App. 1992) (citing ***Llewellyn v. City of Knoxville***, 232 S.W.2d 568 (Tenn. Ct. App. 1950)). It was Ms. Couser's burden at trial to prove that Mr. Magness's actions produced a harmful effect that "annoy[ed] or disturb[ed] [her] free use of [her] property or [rendered] [her] property's ordinary use . . . uncomfortable." ***Shore***, 411 S.W.3d at 415 (Tenn. 2013). *See also* ***Zollinger***, 837 S.W.2d at 615.

Ms. Couser's nuisance claim is based on two averments. First, she contends that Mr. Magness's construction of the large building caused water and debris to drain onto her property resulting in damage thereto and creating a nuisance. Next, Ms. Couser alleges that Mr. Magness's installation of a sewer system for the large building caused a foul odor to permeate her property, thus creating a nuisance. We will address each of these averments in turn.

A. Runoff

Ms. Couser specifically alleges that "the construction of the [large] building resulted in a gully, which caused additional water and other matter to drain down onto the Couser property destroying the fence and a spring, which is approximately 300 yards from the property line." She alleges that Mr. Magness's construction changed the natural flow of water and is an actionable nuisance. *See* ***Zollinger v. Carter***, 837 S.W.2d 613, 614-15 (Tenn. Ct. App. 1992) (quoting ***Dixon v. City of Nashville***, 203 S.W.2d 178, 182 (Tenn. Ct. App. 1946) ("A wrongful interference with the natural drainage of surface water causing injury to an adjoining landowner constitutes an actionable nuisance.")). *See also* ***Butts v. City of South Fulton***, 565 S.W.2d 879, 881 (Tenn. Ct. App. 1977).

Ms. Couser's evidence at trial consisted of: (1) her testimony; (2) Mr. Couser's testimony; and (3) pictures depicting the large building's construction and the fence line. Mr. Magness also testified. In its final order, the trial court found:

> Ms. Couser claims that the waste material being generated by Mr. Magness has drained and will continue to drain onto the Couser property, which constitutes a nuisance. Although the Agreement provides that Mr. Magness will construct a retaining wall to prevent the runoff of gravel or debris onto Ms. Couser's property, Ms. Couser has proffered no evidence that any substantial debris actually spilled over onto her property. Ms. Couser's nuisance claim is dismissed.

In reviewing the trial court, we are mindful of the appropriate standard of review. In ***Johnson v. Malone***, No. E2001-02106-COA-R3-CV, 2002 WL 1063936, at *1 (Tenn. Ct. App. May 28, 2002), this court explained that,

> [t]o determine whether a particular situation constitutes a nuisance, the court must look at the "locality and the character of the surroundings, the nature, utility and social value of the use, the extent and nature of the harm involved, the nature, utility and social value of the use or enjoyment invaded, and the like." [***Pate***, 614 S.W.2d at 47; ***Caldwell***, 391 S.W.2d at 9]. Thus, the issue of whether a nuisance exists pursuant to the above definition is a question of fact. [***Caldwell***, 391 S.W.2d at 9]. Accordingly, our review of the [t]rial [c]ourt's decision is *de novo* with a presumption of correctness, unless the evidence preponderates against the [t]rial [c]ourt's findings of fact. Tenn. R. App. P. 13(d).

Johnson, 2002 WL 1063936, at *1. We are also mindful that most of the evidence in this case was witness testimony. On appeal, Ms. Couser argues that that trial court "completely ignored the testimony of [Ms.] Couser" and "also completely ignored [Ms.] Couser's proof of the runoff. . . ." We disagree. It is clear from the transcript that the trial court considered Ms. Couser's testimony as it examined each photograph of the construction of the large building. During its review, the trial court asked questions of Ms. Couser. Ms. Couser testified that rocks and debris from the construction site flowed onto her property and tore down the fence that marked the property line. She also testified that debris continues to flow onto her property and is destroying her spring.[3] Mr. Couser's testimony corroborated his mother's statements. The trial court also examined each photograph with Mr. Magness and asked questions of him. Mr. Magness admitted that there was some runoff during construction of the large building but explained that there had been no runoff since construction of the large building was completed. He testified that "[t]here's no gully . . . nothing going over the fence, under the fence, pushing through [the] fence." Given the conflicting testimony of the parties, it is apparent from the trial court's final order that it implicitly credited Mr. Magness's testimony over that of Ms. Couser and her son. This Court is "required to defer to the trial court's credibility findings, including those that are implicit in its holdings." ***Williams v. City of Burns***, 465 S.W.3d 96, 120 (Tenn. 2015); *see also* ***Street v. Street***, No. E2016-00531-COA-R3-CV, 2017 WL 1177034, at *7 (Tenn. Ct. App. Mar. 29, 2017). In ***Wells v. Tennessee Board of Regents***, 9 S.W.3d 779 (Tenn. 1999), the Tennessee Supreme Court explained that

> trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. *See* ***State v. Pruett***, 788 S.W.2d 559, 561 (Tenn. 1990); ***Bowman v. Bowman***, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on

[3] We note that there was no evidence beyond Ms. Couser and Mr. Couser's testimony that the spring on the Couser property was being "destroyed."

> credibility determinations. *See* ***Tenn-Tex Properties v. Brownell-Electro, Inc.***, 778 S.W.2d 423, 425-26 (Tenn. 1989); ***Mitchell v. Archibald***, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary. *See* ***Humphrey v. David Witherspoon, Inc.***, 734 S.W.2d 315, 315-16 (Tenn. 1987); ***Bingham v. Dyersburg Fabrics Co., Inc.***, 567 S.W.2d 169, 170 (Tenn. 1978).

Wells, 9 S.W.3d at 783. Therefore, we defer to the trial court's implicit finding that Mr. Magness's testimony was more credible.

In addition to the transcript of the hearing, this Court has reviewed the photographs in the record. We cannot conclude that the photographic evidence preponderates against the trial court's finding that "Ms. Couser has proffered no evidence that any substantial debris actually spilled over onto her property." The photographs simply do not depict debris flowing onto Ms. Couser's property. Again, it was Ms. Couser's burden to prove that Mr. Magness's actions "annoy[ed] or disturb[ed] [her] free use of [her] property or [rendered] [her] property's ordinary use . . . uncomfortable." ***Shore***, 411 S.W.3d at 415. *See also* ***Zollinger***, 837 S.W.2d at 615. This she did not do. Accordingly, we affirm the trial court's dismissal of Ms. Couser's nuisance claim regarding debris flowing from Mr. Magness's property onto hers.

B. Odor

Ms. Couser also argues that Mr. Magness created a nuisance from 2005 through 2008 when he allegedly caused a sewage smell and foul odor to invade her property due to the improper installation of a septic tank. In her appellate brief, Ms. Couser alleges that the trial court failed to make findings on this issue. However, Mr. Magness argues that the trial court "found as a matter of fact that Ms. Couser failed to meet her burden of proof with respect to any trespass of any waste material, including gravel or raw sewage, [onto] her property and properly dismissed her trespass claim." On review of the record, we have determined that the trial court failed to make sufficient findings of fact and conclusions of law concerning this ground for nuisance, i.e. permeation of foul odors. Tennessee Rule of Civil Procedure 52.01 mandates that, "[i]n all actions tried upon the facts without a jury, the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment." Tenn. R. Civ. P. 52.01. This requirement is not a "mere technicality." *See* ***Hardin v. Hardin***, No. W2012-00273-COA-R3-CV, 2012 WL 6727533, at *3 (Tenn. Ct. App. Dec. 27, 2012) (quoting ***In re K.H.***, No. W2008-01144-COA-R3-PT, 2009 WL 1362314, at *8 (Tenn. Ct. App. 2009)). "[F]indings and conclusions facilitate appellate review by affording a reviewing court a clear understanding of the basis of the trial court's decision." ***Lovlace v. Copley***, 418 S.W.3d 1, 34 (Tenn. 2013).

"There is no bright-line test by which to assess the sufficiency of factual findings, but 'the findings of fact must include as much of the subsidiary facts as is necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue.'" ***Lovlace***, 418 S.W.3d at 35 (citing 9C Charles Wright et al., Federal Practice and Procedures § 2571 at 219-33 (3d ed. 2005)). As discussed above, Ms. Couser alleges that Mr. Magness created a nuisance when he caused a sewage odor to permeate her property. The trial court's order wholly fails to address this allegation. Generally, the appropriate remedy when a trial court fails to make appropriate findings of fact and conclusions of law pursuant to Rule 52.01 is to "vacate the trial court's judgment and remand the cause to the trial court for written findings of fact and conclusions of law." ***Lake v. Haynes***, No. W2010-00294-COA-R3-CV, 2011 WL 2361563, at *1 (Tenn. Ct. App. June 9, 2011). However, in certain cases, this Court has concluded that it may "soldier on" with its review despite the trial court's failure to comply with Tennessee Rule of Civil Procedure 52.01 when the case involves a clear issue of law or the trial court's decision is readily ascertainable. *See* ***Schnur v. Sherrell***, No. E2016-01338-COA-R3-CV, 2017 WL 2791711, at *3 (Tenn. Ct. App. June 27, 2017) (affirming the trial court's judgment despite a lack of findings of fact when the trial court orally articulated its reasoning); *but see* ***Douglas v. Caruthers & Associates, Inc.***, No. W2013-02676-COA-R3-CV, 2015 WL 1881374, at *10 (Tenn. Ct. App. Apr. 24, 2015) (remanding to the trial court for entry of findings of fact in compliance with Rule 52.01 when the case presented complicated questions of law that required a fact-intensive inquiry and the trial court's decision was not readily ascertainable). Here, the trial court's decision is readily ascertainable based on the evidence in the record. Therefore, to resolve the fifteen-year litigation between the parties and to, hopefully, avoid further litigation, we will soldier on to examine whether Ms. Couser proved her nuisance claim concerning the sewage smell.

The record reflects that, from 2006 through 2008, Ms. Couser reported the sewage odors, which allegedly emanated from Mr. Magness's property, to the Williamson County Department of Sewage Disposal Management ("Sewage Department"). A representative from the Sewage Department performed on-site inspections of Mr. Magness's property on December 4, 2006, March 29, 2007, and October 17, 2008, and each time reported that he neither smelled nor saw sewage on the property.[4] Despite these reports, Ms. Couser testified that there was a raw sewage smell that permeated her property during this time. Mr. Magness refuted Ms. Couser's testimony. Although the primary evidence on this issue was the conflicting testimony of the parties, only Mr. Magness's testimony is corroborated by the Sewage Department reports. Accordingly, the evidence preponderates against Ms. Couser's allegation, and we conclude that she did

[4] During the October 17, 2008 on-site investigation, two Sewage Department employees discovered that Mr. Magness illegally installed a septic system for the large building along with illegal plumbing (i.e. toilet, sink, and shower). After receiving notice of his violations, Mr. Magness completed a zoning application, obtained a septic permit, and brought the property into compliance.

not meet her burden concerning nuisance based on the foul smell. As such, we affirm the trial court's dismissal of her nuisance claim *in toto* and pretermit any discussion of damages.

V. Conclusion

For the foregoing reasons, we affirm the judgment of the trial court. The case is remanded for such further proceedings as are necessary and consistent with this opinion. Costs of the appeal are assessed against the Appellant, Edith G. Couser, for all of which execution may issue if necessary.

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KENNY ARMSTRONG, JUDGE